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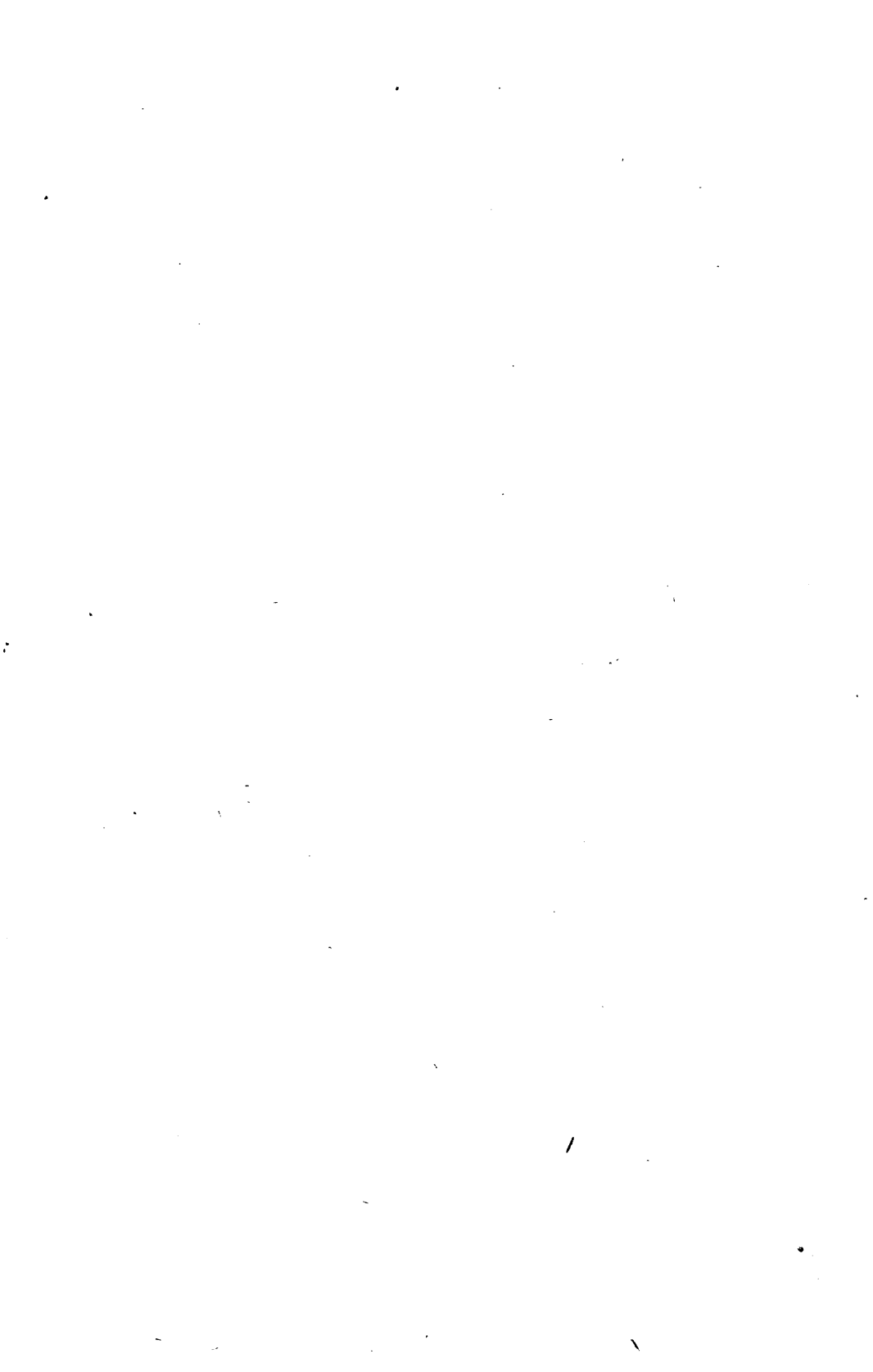


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REPORT
TO THE
Chamber of Commerce and Board of Underwriters
OF THE CITY OF NEW-YORK,
ON THE PROCEEDINGS OF THE
INTERNATIONAL CONGRESS,
HELD AT YORK, IN ENGLAND,
On the 25th, 26th and 27th days of September, 1864,
TO INAUGURATE MEASURES TO PROMOTE
A UNIFORMITY
IN THE MODE OF
ADJUSTING GENERAL AVERAGES
In the different Countries of the World.
WITH AN APPENDIX,
CONTAINING THE FRENCH, DUTCH, GERMAN, NORWEGIAN AND
SWEDISH CODES ON THE SUBJECT OF AVERAGES.

~~~~~  
BY HON. WILLIAM MARVIN,  
DELEGATE.

New-York :  
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—  
1866.



NOV 1 1934

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## INTERNATIONAL GENERAL AVERAGE.

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At a meeting of the Chamber of Commerce of the City of New-York, held March 1st, 1866, the following report was presented and adopted by the Chamber :

The Committee to whom was referred the report of Hon. WILLIAM MARVIN, delegate from this Chamber to the International General Average Congress, held at York, in England, on the 25th, 26th and 27th days of September, 1864, for the purpose of initiating measures to produce a greater degree of uniformity in the mode of adjusting general averages in the different countries of the world, have had the same under consideration, and now respectfully beg leave to report :

That they consider the object contemplated by the Congress referred to as greatly conducive to the best interests of commerce, and therefore highly desirable; but the best mode of accomplishing it involves a *problem* of no little difficulty. It hardly appears probable that the ship-owners and underwriters in different parts of the world can be so generally induced to insert a clause in their bills of lading and policies of insurance requiring the adjustment of averages to be made in conformity with the rules recommended by the Congress at York, as to make that mode of producing uniformity to become effectual. The only sure way of accomplishing the object, it appears to

your Committee, is by legislation. If either the Congress of the United States, the Parliament of Great Britain or the Senate and Corps Legislatif of France, would take the subject into consideration, and digest rules and regulations, proper to be observed in the adjustment of general averages throughout the world, and enact them into a law, then the legislative bodies of other commercial nations would, in the opinion of your Committee, in a short time, follow the example set them, and adopt the same law ; and so, in this way, in comparatively a few years, one uniform law on the subject would prevail throughout the world.

Whatever measures the Chamber may think proper to adopt in relation to this subject, at present or at some future time, the Committee cannot but express the strong desire that the highly valuable information contained in the report of Judge MARVIN, collected by him with great labor and loss of time, may be preserved in a permanent form, satisfied that it will prove useful to legislative bodies, as well as to ship-owners, merchants and underwriters, and they therefore recommend that one thousand copies be printed—six hundred of which be incorporated in the Annual Report of the Chamber, and four hundred copies be issued in pamphlet form for distribution.

Respectfully submitted.

(Signed,) LEOPOLD BIERWIRTH, { *Special*  
JOHN D. JONES, { *Committee.*

*New-York, March 1st, 1866.*

# REPORT.

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TO ABIEL A. LOW, Esquire,  
*President of the Chamber of Commerce, and*  
JOHN D. JONES, Esquire,  
*President of the Board of Underwriters of New-York:*

GENTLEMEN,—Having, by the request of the Chamber of Commerce and Board of Underwriters of New-York, attended a meeting of delegates, some of whom were appointed by their respective governments, and others by different commercial associations located in Europe and the United States, assembled at York, in England, on the 25th, 26th and 27th days of September, 1864, with a view to inaugurate measures to produce a greater degree of uniformity in the mode of adjusting general averages in the different countries of the world, I have now the honor to submit to your respective bodies my report.

I might properly assume that the experienced ship-owners, merchants and underwriters, who compose the Chamber and Board, understand perfectly well the difference between general and particular averages. But it is no impeachment of the general intelligence of the less experienced members to suppose that a brief explanation of the difference between these two kinds of averages may be useful to them, by enabling them to understand more easily the subject-matter of this report, and what was intended to be accomplished by the proceedings at York.

What, then, are particular averages? and what are general averages? Particular averages are losses or damages occurring to the ship or cargo or freight, resulting from *accident*, or extraordinary expenditures incurred for the sole benefit of some particular interest; as of the ship alone, or of the cargo alone, or of the freight alone. These are to be borne and paid wholly by the party on whose property the loss falls, or for whose benefit the expenditure was made. General, common or gross averages are sacrifices *voluntarily* made or expenses incurred for the common benefit of ship, freight and cargo, as throwing overboard cargo to lighten and save the ship in a storm, or on a reef, or paying money to redeem the ship and cargo jointly from an enemy or pirate; and they are called general, common or gross averages because they are to be borne or paid in common by the parties benefited by the sacrifice or expenditure. They are to be apportioned upon ship, freight and cargo. The most striking difference, then, between general and particular averages is, that the former proceed from an act of *volition*, and the latter from *accident*. All averages are presumed to be particular, unless shown to be general.

To constitute a case of general average three things must concur: 1st. There must be a common danger impending in which ship, freight and cargo participate. 2d. There must be a sacrifice of a portion of the ship or cargo, or extraordinary expenses incurred for the purpose of avoiding that common peril. 3d. The attempt to avoid the peril must be successful.\*

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\* M. CAUVET, in his *Traité sur les Assurances Maritimes*, classifies in the list of cases of general average the following, according to the customs and usages which prevail in the ports of France:

In order to constitute a case of general average contribution, the question, whether the motive of making the

1. A jettison of cargo, including its accessories, such as damage done to the ship or other goods in order to get at the merchandise to be thrown overboard, damage resulting to the goods remaining in the ship from a derangement of the stowage, and damage proceeding from water going down the scuttles. A jettison of deck cargo is not contributed for except in short coasting voyages.

2. The cutting away of the masts, sails or rigging to relieve the ship, including the damage caused by their falling on deck.

3. When a mast is accidentally carried away by the violence of the winds, and it is necessary, in order to work the ship, to disengage the wreck from the ship by cutting the rigging which cannot be saved in the gale, the estimated value of the rigging and sails at the time and place of the sacrifice is allowed in general average.

4. When, in order to avoid capture or shipwreck, the master carries an extraordinary press of sail, whereby the masts are sprung or broken, the damage is general average.

5. When the master has anchored in the course of the voyage, and a sudden change of the wind endangers the ship, and the danger is so pressing that it is necessary to the safety of the ship to fly immediately without waiting to weigh anchor, and the master slips the chain, the abandonment of the chain and anchor in such cases is general average. It is the duty of the captain to attach a buoy to his anchor when he can, and if he falls in this duty he cannot recover its value in general average. If he regains the anchor it is the cost of repossessing himself of it that is allowed.

6. Damage done to the stranded ship by cutting a hole in her in order to extract the merchandise, in case the ship and merchandise are saved, and also damage done by making an opening in the sides of the ship to let the water run off, are general average.

7. If, in order to avoid capture or a tempest at sea, it is necessary to lighten the vessel and get it over a bar into some haven or river, not in the course of the voyage, the expense is general average; and when, in going into or coming out of a port, haven or river in the ordinary course of the voyage, it is necessary to lighten the ship, if any of the goods put on board the lighters are lost or damaged, the loss or damage is general average; but the *expense* of lightering in this case is the foreseen and ordinary expense of making the voyage, and must be paid by the ship-owner. If the goods put into the lighters arrive, and the ship and rest of the cargo perish, there is no contribution.

8. The *expenses* incurred for the common benefit in refloating a loaded stranded ship, whether stranded fortuitously or voluntarily, including damage to the ship, rigging, boats, or the damage to or loss of goods occasioned by the efforts made to refloat the ship, are general average. If the measures taken to refloat the ship fail, and the ship is lost, all the averages will be particular, and the expenses of saving will be arranged in two classes—the one particular to the ship, the other to the

sacrifice or incurring the expense, must be the "common safety," or whether it may be the "common benefit," was

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cargo, according as they have in the end been respectively benefited. If the stranding was voluntary, then all the *damage* to ship or cargo is general average, provided, always, that the ship is refloated with the cargo on board, or the ship resumes the cargo and proceeds on the voyage or to a port of refuge.

9. The hire of extra men, when necessary, to assist the crew to pump the ship when leaking badly until the cargo is all out of the ship.

10. Towage into port or a place of safety of a disabled ship, which can no longer manœuvre, or one leaking badly, so as to be in danger of sinking, is general average.

11. If, in order to avoid capture, a tempest, sinking or other peril to ship and cargo, the master, after due consultation with the crew, deviates from the course of the voyage and goes into a port of refuge for the common safety of ship and cargo, the port dues, pilotage and other expenses of entering and leaving the port, the expense of unloading the cargo when a leak in the ship endangers the cargo, and such unloading is necessary to stop the leak, and the leak is stopped and the voyage resumed, including damage or deterioration to the cargo caused by the unloading, and the expense of storing and reloading the cargo, are general average. If the leak is insufficient to endanger the cargo, the unloading should be deferred; and if the captain unloads the cargo in such case, he should pay the expense, because he might have avoided it. In general, however, the recommendation of surveyors or experts, properly appointed, will protect the captain. The expense of repairing the ship is general or particular average according as the damage or injury repaired is general or particular. The wages and provisions of the crew during the detention are, in practice, regarded as particular average, whatever may be the cause of the putting into port, or whether the ship is freighted by the voyage or by the month. The expense of going into port on account of a want of provisions, and the expense of coming out, is a particular average to the ship, such want being the master's fault, or the effect of a fortuitous accident occurring to him in the fulfilment of his contract to carry. The cost of surveys of ship or cargo are apportioned or divided according to the character of the subject surveyed or the damage. The cost of surveys of particular average to the ship are particular, of general average, general, being accessorial to the nature of the original cause of the survey. So also of the cargo, and of the orders of consuls and copies of them, and of the report of surveyors. The cost of the master's protest is general average when the expense of going into the port is so, or when it verifies damages or expenditures classified as general average. Interest, commissions on money advanced, the premium on borrowing money on bottomry or respondentia and the cost of borrowing, are added to the principal of each average in the proportion that it bears to the total expenditure.

Damage to or loss of goods in the storehouse in a port of refuge by water or by fire is not general average, but falls on the proprietors. In like manner, damage to a ship by accidental stranding in entering a port of refuge is not general average.

lately very much discussed by the delegates who attended the Congress held at York. The English and French

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12. Freight paid to another vessel for carrying on a part of the cargo from the port of refuge which the ship is unable to restow or carry, is general average.

13. When a ship is condemned in a port of refuge as incapable or unworthy of repairs, expenses are incurred for keeping and selling the ship, and for unloading, storing and reloading the cargo upon another vessel. These expenses are not general average, but are at the charge of each proprietor of the thing which necessitates them. They are ordinarily paid by a loan on a respondeat bond upon the cargo, or by the proceeds of the sale of the ship or of the damaged merchandise. Hence the necessity of an adjustment of the account between him who has paid the loan and taken up the bond, or whose ship or goods have been sold. This account is adjusted by a classification of the averages and expenses between the ship and the cargo according to the causes which produced them. In like manner, in a case of shipwreck, there are expenses incurred on account of the ship and on account of the cargo. These are adjusted in the same manner as in a case of the condemnation of the ship. The adjustment becomes complicated when the cargo comprehends different kinds of goods belonging to different proprietors. A condition of things then arises requiring the recognition of several classes of expenses. In the first class are the general expenses to be apportioned between the ship and cargo; in the second, expenses concerning the cargo as a totality; and then the expenses incurred on account of each species of merchandise. These classes of expenses established, it is necessary to apportion between the ship and cargo the general expenses, and between the different species of goods the expenses relating to the cargo. When the adjuster can, he determines what expenses have been incurred on account of the ship and what on account of the cargo. But this, in many instances, is extremely difficult, on account of a want of definite information; as, for instance, where money is expended for paying laborers employed in saving and transporting ship's materials and cargo indiscriminately, expenses of correspondence, &c. In such cases the expense is apportioned according to the values saved at the place of saving; and if this cannot be ascertained, then at the place of destination, deducting the freight and landing charges and a certain profit, in order to approximate as near as possible to the values at the port of refuge or place of shipwreck and saving. The expenses incurred by the cargo as a totality are divided between the different kinds of goods partly in proportion to volume and weight and partly in proportion to their respective values. The cost of labor, cartage, &c., is divided upon the goods saved according to volume and weight, and the commissions, &c., paid, according to values.

14. Things given voluntarily by way of composition for the ransom of vessel and cargo from captors or from pirates is general average; but when the enemy or pirate himself chooses to take, at his own discretion, certain things, leaving the ship thereupon to depart, the loss is an average particular, and falls on the proprietor of the thing so taken. Expenses incurred in good faith to obtain the restitution of a captured ship and cargo, when it is obtained, and the wages and expenses of the crew



systems, as administered by the average adjusters in the absence of express decisions of the courts on the question, accord best with the idea, that the motive for making the sacrifice or incurring the expense *must* be the common *physical* safety of the property; and this attained, the general average charges cease, although the ship may not have completed the voyage. The American system accords best with the idea, that the motive *may* be either the physical safety of the property or the common benefit, *i. e.*, the arrival of the ship and cargo in company at the port of delivery. The English and French systems recognise the idea, that the community of interest is interrupted or suspended by the landing of the cargo in a place of safety, however remote from the port of destination; whereas the American system recognises the community of interest as continuing, uninterruptedly, until the termination of the adventure.

The question has been raised whether general average contribution is due when the danger originates in the mismanagement or fault of the master or owner of the cargo or a third person. Some codes provide, and among them the new German code, that contribution shall in such case take place, but the party at fault shall not receive anything, but shall be liable to reimburse the other contributors.

It has, also, been very much discussed, whether the right to contribution in general average is founded in natural equity or in policy. The common opinion is, that

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who remain on board to guard and reclaim the same, are general average. Losses and expenses incurred in consequence of the arrest or detention of a ship by the government are not general average, nor are losses and expenses incurred in going to or remaining at another port in consequence of the blockade of the port of destination.

it is founded in natural equity; that what is given for the common benefit of all should be made good by the contribution of all. M. CAUVET, a late French writer, objects to this theory, and argues that it is founded in expediency or policy, and that if it were founded in natural equity it ought to grow out of similar transactions occurring on the land as well as on the sea; and to show that it does not grow out of transactions on the land, he cites a case decided in the Court of Cassation, in which it appeared that a diligence conductor, being assailed by robbers, delivered to them the smallest of several bags of money, and thereby saved the rest. In an action brought by the owner of the bag so delivered to the robbers, against the owners of the other bags for contribution, it was decided by the court that he could not recover—that general average contributions had their foundation in the laws and customs which govern transactions occurring on the sea and not on the land.

From the necessity of the case, it is at the port of delivery, wherever that may be, or where the ship and cargo are separated from each other, that an adjustment of all general averages incurred during the voyage must be made. An adjustment made at such port according to the law of the port, is, by the general maritime law, held to be conclusively binding between the ship-owner and the cargo owners, wherever they may respectively reside, unless they have stipulated to the contrary.\* Whether it is equally binding upon their respective underwriters is not so clearly settled. That these settlements, which necessarily take place in all the different parts of the world, should be equal, fair and just, and according to some common rule of right, everywhere received, is

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\* *SIMONDS vs. WHITE*, 2 *Barn. and Cress.*, 805; 1 *Story*, 463.

something very much to be desired by all persons engaged in maritime commerce.

Ships are essentially cosmopolitan. They go everywhere where ships can go. They are often owned in one country and insured in another, and their cargoes owned and insured in several. Frequently they load in distant countries for a port in Europe, not determined on beforehand. The ship presents herself before Falmouth, Queenstown, Belle-Isle or Lisbon, where a pilot brings a letter to the captain, directing him to proceed to Amsterdam, London, St. Petersburg, Havre, Trieste or Constantinople. "Is it not shocking to think," says M. DE COURCY in a pamphlet lately published at Paris, at the request of its Chamber of Commerce, on the subject of International General Average, "that if the captain has a controversy on hand with the owners of the cargo on account of general averages to be settled, the interests of his owners will be more or less protected by the law, according as he may be directed to the one or the other of these ports by the charterer, whose interests, in consequence of these averages, have already become adverse to those of the ship-owners?"

It was with the view of initiating measures which would ultimately result in removing, or at least diminishing the evils of existing diversities in the modes of settling general averages, that the Congress at York was held. Its history is briefly this:

At the instance of certain ship-owners, merchants and underwriters of Liverpool, a circular, signed by Lord BROUGHAM, the President of the British National Association for the Promotion of Social Science, Sir THOMAS BARING, chairman of Lloyds, DUNCAN DUNBAR, chairman of the General Ship-owners' Society in London, and the chairmen of the most of the ship-owners and underwriting

associations in London, Liverpool, Glasgow, Hull and Bristol, was sent, in the summer of 1860, to the different Chambers of Commerce and other commercial bodies in different countries, inviting them to send delegates to a Congress which was to be held at Glasgow in the succeeding September, in connection with the "National Association for the Promotion of Social Science."

In response to this invitation, delegates from Chambers of Commerce or Boards of Underwriters in Amsterdam, Antwerp, Boston, Bremen, Copenhagen, Hamburg, New-York, New-Orleans, Liverpool, London, Glasgow and other commercial bodies, met at Glasgow at the time appointed. Their sittings were presided over by Lord BROUGHAM and Lord NEAVES.

The result of their deliberations was the adoption of a resolution providing for the drafting, printing, circulating and amending of a bill which should define the term "General Average," and describe the cases intended to be included within the definition, and which should specify the nature of the loss, damage or expense allowable in general average, and furnish a rule for ascertaining the contributory values of the interests concerned. In other words, the plan adopted contemplated the preparation and perfection of a brief code covering the whole subject, and its eventual enactment into a law by the legislatures of the different commercial nations of the world. In pursuance of this plan, a bill was subsequently prepared, printed and circulated in Europe and America, and amendments were invited from different commercial bodies in these countries. At a subsequent Congress, held at London in 1862, it was concluded that the bill which had been prepared was objectionable in so many particulars that its abandonment became necessary. The Congress thereupon appointed a committee, whose duty it was

made to enunciate and discuss in print, each for himself, the leading principles which he thought ought to be admitted into a system of international general average. Accordingly the several members of this committee addressed themselves to this task, and during the year 1863 they published their views in some eight or ten different pamphlets. After a careful consideration of these views, the chairman of the committee, and some of its members, thought it advisable to abandon the idea of codifying the whole law of general average, and instead thereof to prepare a short bill which should cover only those principal points of disagreement which they found to exist in the customs and laws of the different countries. Such a bill was accordingly drawn up, printed and circulated in Europe and the United States, in the early part of 1864. It was laid before the Congress assembled at York in the succeeding September, and was there discussed, and after some amendments had been made, it was finally adopted by the Congress. The Congress thereupon recommended to the legislatures of the different commercial nations to enact the same bill into a law. The true value of this recommendation will be more easily appreciated after knowing something of the number and character of the delegates in attendance. There were present delegates from Chambers of Commerce of Bremen, Hamburg and Lubec, from the Belgian and Russian governments, the Comité des Assurances Générales of Paris, the Board of Underwriters at Amsterdam, the Ship-owners' Society of London, the Liverpool Underwriters' Association, the Chamber of Commerce of New-York, the Board of Underwriters of New-York, the Board of Trade of Boston, and a number of other commercial bodies mostly located in Great Britain.

The committee for managing the affairs of Lloyds sent

a letter to the Congress, in which they expressed a disinclination to participate in the proceedings of the Congress mainly on two grounds: first, that it appeared to them that the object of the Congress was more to effect changes in the English law and assimilate it to the laws of other countries, than to produce uniformity in the laws of different countries on the subject. Second, they thought the draft-bill to be acted upon favored too much the ship-owner at the expense of the cargo owner. They said that a uniform law was much to be desired by the commercial world, but they did not see the means to attain this end in the plan proposed.

It is obvious that uniformity in the mode of adjusting general average losses in the different ports of the world to which ships may go, can only be obtained by the adoption of one general law by the different nations, or by each nation incorporating into its commercial treaties with every other nation the same one law. Of these two plans, the first is manifestly the best and most feasible.

It is not pretended by the persons engaged in initiating this movement, that the disagreements at present existing are either so numerous or so great as to be an evil of overpowering magnitude; but it is claimed that they are an evil of sufficient magnitude to excite the attention of commercial men of every nation, and enlist their co-operation in all reasonable efforts to abolish them.

In order to enable your respective bodies to form a correct judgment in regard to the character and extent of these disagreements, and as to whether they are of sufficient importance to induce them to take any measures to carry out the recommendation of the Congress at York, I have appended to each section of the bill adopted by the Congress a statement of the existing mode of adjusting general averages in several of the countries of Europe

and in our own country. By thus bringing the customs of different countries on this subject in juxtaposition, their agreements and disagreements will be readily seen, and their importance or want of importance at once recognised.\*

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\* For the law and custom of England and the United States, I have consulted the reports of the decisions of the courts of these countries, and the treatises of BAILEY, HOPKINS, ARNOULD, STEVENS, BENECKE, PHILLIPS and PARSONS; for the law and custom of the ports of France and other countries on the continent of Europe, the Code de Commerce, with the commentaries thereon by ROGERON, the works of BOULY PATTY, PARDESSUS, the decisions of the French courts contained in a large number of volumes of reports, found in the Astor Library; *Traité des Avaries Communes et particulier suivant les divers législations maritimes*, par ERNEST FRIGNET, docteur en droit, &c., Paris, 1859; *Traité sur les Assurances Maritimes comprenant la matière des assurances, du contrat à la grosse et des avaries*, par J. V. CAUVET, avocat, Paris, 1862; *Guide Général des Assurances Maritimes et Fluviales*, par GABRIEL LAFOND DE LUCOR; *Manuel de l'Assuré de Vade-Mecum du commerce maritime*, par AUGUSTE MOREL; *Concordance outre les codes de commerce étrangers et le code de commerce Français*, par ANTHOINE DE SAINT JOSEPH. An excellent paper drawn up by THEODORE ENGLS, Esq., President of Belgian Lloyds Association of Underwriters, and EDWARD VAN PEBOURGH, Esq., Professional Despacheur, both of Antwerp, and printed for the benefit of the International Average Committee, gives a very satisfactory statement of the Belgian customs. The commercial code of Holland, an English translation of which may be found in a collection of commercial law made by LEONE LEVI, a copy of which is in the library of the Chamber of Commerce, and a French translation by M. WINTGENS, a Dutch lawyer, a copy of which may be found in the Astor Library, is so full and comprehensive as to leave little else to be desired on the subject. The new German Commercial Code is the product of the labors of the eminent lawyers and merchants of that country, and on the subject of averages, the only portion I have read, I think it is the most complete and perfect of any of the European codes. It has been adopted in Prussia, Mecklenburgh, Hanover, Lubec, Bremen and Oldenburgh. M. FRANK, a distinguished and learned doctor of the civil law, and a delegate to the York Congress from Lubec and Hamburg, writes me that a commission appointed by the government of Hamburg to consider the subject, has recommended its adoption without alteration, to take effect in the autumn of 1865, giving the intermediate time to the lawyers and merchants to familiarize themselves with it. He says there is no doubt that it will then become the law of Hamburg. Austria has adopted the mercantile portion of the German code, but not the maritime. Labors are going on at Trieste to get up a separate maritime code for Austria. At the present time, adjusters at Trieste and Venice follow the Code de Commerce of France. Sweden and Norway have both adopted new commercial codes. That of Sweden went into operation on the 1st of January, 1865, and that of Norway in 1860. The codes of both of these countries, on the subject of averages, is in substantial agreement with the new German code. The principal

The sections of the bill recommended to be adopted by the Congress at York are distinguished from my own observations by being included in quotation marks.

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[Jettison of Deck Cargo.]

“SECTION I. A jettison of timber or deals, or any other description of wood cargo, carried on the deck of a ship in pursuance of a general custom of the trade in which the ship is then engaged, shall be made good as general average, in like manner as if such cargo had been jettisoned from below deck.

“No jettison of deck cargo, other than timber or deals, or other wood cargo, so carried as aforesaid, shall be made good as general average.”

“Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.”

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The general rule of the maritime law in all commercial countries is, that goods carried on the deck of the vessel and thrown overboard for the common safety, are not entitled to be contributed for in general average, though they

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difference being, that the former make the freight contribute for the one-half only of its gross value, while the latter makes it contribute for two-thirds. By all these northern codes the ship contributes on its full value. I am indebted to Dr. FRANK for much valuable information concerning the present state of maritime law in European countries. English and American lawyers and merchants are also greatly indebted to M. ERNST EMIL WENDT, of London, for an excellent English translation of so much of the new commercial German code as relates to the subject of averages, collisions, and salvage and assistance, in all cases of distress, and for other interesting papers read before the Congress at York.



contribute to the jettison of other goods. The exception to this rule in England and the United States is, that when the goods carried on deck are carried there in conformity with a custom of the trade in which the vessel is engaged, and are stowed in the customary way, they are to be contributed for.\* There exists in Liverpool a custom among the ship-owners, shippers, merchants and underwriters in the trade of carrying timber from British North America to England, which has been recognised by the courts as legal, that the loss occasioned by the jettison of timber loaded on deck, is not contributed for by any general average among all the owners of the ship, freight and cargo on board, but the loss is apportioned over the ship, the freight of cargo both on and under deck, both jettisoned and not jettisoned, according to their respective values, by a statement which is called general *contribution*, but no owner of any of the interests is, by the custom, liable for the proportion falling on his interest, except those who are parties to the contract for the carriage on deck; and no underwriter on the ship is liable, under the ordinary form of policy, to pay or contribute towards the amount of the general contribution payable or borne by the ship-owners on account of the jettison of any timber stowed upon deck.†

This custom is entirely just. The owner of cargo carried under deck ought not to be compelled to contribute for the jettison of cargo carried on deck.

The French and Belgium codes authorize the master, in short voyages (*petit cabotage*) along the coast, and as far as the southern and eastern coasts of England, to carry

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\* *HARRIS vs. MOODY*, 4 Bos. 210. 22 Pick. 108. 2 Arnould, § 325.

† *MILLER vs. LETHERINGTON*, Ex. Ch. 1863.

cargo on deck, and, if jettisoned, it is allowed for in general average. The merchants and underwriters in both countries complain against the law, that it does not define the limits of these short voyages, but they are left to be ascertained by ancient and vague ordinances. They also allege that, even in these short voyages, the custom of carrying goods on deck is hazardous and injurious to the interests of commerce.\*

By the code of Holland the master is held responsible for every damage which may happen to goods carried on deck without the consent in writing of the shipper; but if they are so carried without such consent, and are damaged or jettisoned, the damage or loss is made good in general average, and the contributors have their remedy over against the captain and the ship.†

The new German code allows, in general average, a jettison of deck cargo in coasting voyages.‡

Should the York bill become a law in the United States, it might be wise to except the coasting trade from the operations of the section under consideration.

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[Damage by Jettison and Breakage.]

“SECTION II. Damage done to goods or merchandise  
“by water which unavoidably goes down a ship’s hatches  
“opened, or other opening made, for the purpose of  
“making a jettison, shall be made good as general aver-  
“age, in case the loss by jettison is so made good.

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\* *Prignet*, 351-3. *Rogron*, Art. 421.

† *Code*, §§ 348, 733.

‡ § 710.

“Damage done by breakage and chafing, or otherwise, from derangement of stowage consequent upon a jettison, shall be made good as general average.”

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Damage done to goods by water, which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of making a jettison, is contributed for in general average by the law or custom of England, the United States, France, Belgium, Holland, Denmark and by the new German code.\* Such damage is considered as an accessory of the jettison, or the immediate direct consequence of making the jettison.

Invoking the principle *causa proxima non remota spectatur*, i. e., that we are to look to the immediate cause of the damage, not the remote, in order to determine whether the damage should be allowed in general average, the English and Belgic average adjusters reject from contribution damage caused by breakage and chafing resulting from a derangement of the stowage of the cargo, consequent on making a jettison. The damage, they argue, is caused by the unintended accidental derangement of the stowage, and not by making the jettison. It is, they argue, the consequence of a consequence.†

In practice, this damage is generally allowed in general average in France, Holland and the United States. In *LEE vs. GRINNELL*,‡ damage to the knees and timbers of the vessel, caused by the swelling of grain in the lower hold, which was caused by letting water into the vessel by scuttling, was allowed in general average.

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\* *German Code*, § 708. *French Code*, § 400. *Holland Code*, § 699. *Baily*, 171.  
13 *Peters*, 343. *Phillips*, § 1286.

† *Baily*, 171. *Antwerp Custom*, Appendix.

‡ 5 *Duer*, 429, 310. *Cauvet*, § 351.

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[Extinguishing Fire on Shipboard.]

“SECTION III. Damage done to a ship and cargo, or  
“either of them, by water or otherwise, in extinguishing  
“a fire on board the ship, shall be general average.”

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This damage is in practice rejected from the column of general average in England, and admitted in the United States, Holland and Belgium.\*

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## [Cutting away Wreck.]

“SECTION IV. Loss or damage caused by cutting  
“away the wreck or remains of spars, or of other things  
“which have previously been carried away by sea peril,  
“shall not be made good as general average.”

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This damage is not allowed in general average in England nor the United States, on the grounds, that the wreck itself is the immediate cause of the impending danger which renders its cutting away necessary, and because of the difficulty of determining its value, if it possess any, at the time of the jactus.

It is allowed in France. “When a mast,” says M. CAUVET, “has been accidentally carried away, and the master cuts the rigging which still holds it to the ship, and throws it overboard with the rigging and sails, the value they possess at the time of the jactus is allowed in

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\* *Bailey*, 81. 5 *Duer*, 810. 25 *Penn.* 366.

general average.”\* “If the wind,” says PARDESSUS, “cracks a mast, and afterwards it becomes necessary for the safety of the ship to complete the fracture, and throw it, with the sails and cordage, into the sea, this last measure would be general average. Consequently, the amount of this loss should be determined according to the value the mast and accessories had in its broken condition, caused by the wind or *par le cas fortuit*, in which broken condition, antecedent to the sacrifice, the damage was particular average only.”†

In Belgium, in practice, one-third the value is considered as general average, one-third particular and one-third new for old.

In Holland the value of the wreck, as such, is contributed for.

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[Voluntary Stranding.]

“SECTION V. When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo and the freight, or any or either of them, by such intentional running on shore, shall be made good as general average.”

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Damage to vessel or cargo, caused by accidental stranding, is particular average. But expenses incurred in refloating a stranded ship with the cargo on board, or by landing the cargo, using steam-tugs or resorting to other

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\* § 352. *Frignet*, § 320.

† § 738.

measures begun and carried on continuously by the master as one enterprise, with a view as well to the preservation of the cargo as to the refloating of the ship and the prosecution of the voyage, and the ship is refloated, and she resumes her cargo or prosecutes the voyage, are, I believe, universally considered to be general average, including the expenses incurred subsequently to the landing of the cargo, as well as those antecedently incurred, and including also the damage caused to the ship or cargo by the means employed to refloat the vessel; and these expenses are, in such cases, general average, without regard to the question, whether the vessel be voluntarily or accidentally stranded. But if, after the cargo is landed and put in a place of safety, the vessel does not float, and a new and distinct enterprise is entered upon and carried on by the master for the purpose of refloating the ship, the expenses of such *new* enterprise are not in England nor in France general average, notwithstanding the vessel, after being refloated, resumes and carries on her cargo. In the United States the expense of such new enterprise, carried on by the master with a view to the further prosecution of the voyage, would, according to principles lately established, be general average, provided the cargo, though landed in safety, remains under the control of the master, and is liable to be taken on board again by him for the purpose of prosecuting the voyage. But if the cargo, being landed and in safety, the master abandons the enterprise of refloating the ship, or if the cargo or all but mere remnants of it has been conveyed in lighters to its port of destination, and so is not to be taken on board again for the purpose of prosecuting the voyage, the community of interest is dissolved by the abandonment of the enterprise in the one case, or by the landing of the cargo in the other, at the port of destination, and the ex-

penses subsequently incurred are not general average. The community of interest is supposed to remain until the voyage is abandoned or the cargo landed in its port of destination, or until in some other way there is a complete separation of the cargo from the ship, not again to be reunited; and whatever is done for the protection of the common interest should be done at the common expense. If, however, part of the cargo be transhipped by the master to the port of destination, in the process of lightering the ship with a view to the refloating of the vessel, and the vessel is refloated by one continuous series of operations, carried on by the master, and she finishes her voyage with the rest of the cargo on board, the part so transhipped will be liable to contribute to the general expenses of refloating the vessel, as well those incurred subsequently to such transshipment as those antecedently incurred.\*

If the stranding is followed by shipwreck there is no contribution. The interests are dissociated by the wreck of the vessel, and the principle "*Sauve qui peut*," "*Save who can*," applies. "*Chi salva*," says CASAREGIS, "*chi perde*."† In my opinion the ties which bound the ship and the cargo together are not only dissolved by the loss of the ship, but the ties which bound the several shipments of the cargo to each other are also dissolved by that event. So that wherever it is practicable each separate shipment should pay the expenses of its own saving. Goods of great value and little bulk, easily saved, belonging to A., ought not to be held to contribute to pay the expenses of saving B.'s goods of great bulk and little value, saved with much difficulty and at greater ex-

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\* NELSON vs. BELMONT, 21 N. Y. R. 36. Ship RACHEL. McANDREWS vs. THATCHER, U. S. Sup. Court, Dec. Term, 1865. BEVAN vs. BANK U. S., 4 Wharton, 301.

† Meredith's Emerigon, p. 473.

pense. Whenever the saving is accomplished by different sets of salvors, or under different contracts or at different times, and in some cases even when the cargo is all saved together by the same set of salvors, the tribunal which determines the sum to be allowed the salvors for saving the property, may, and, in my judgment, frequently ought to discriminate between the expenses of saving each separate shipment, and charge each shipment with its own proper expenses. Where such discrimination has been made, either by a special contract or the award of a competent tribunal, average adjusters generally adopt it and adjust the expenses accordingly. But when this has not been done, I think it is competent for an adjuster to discriminate when he can between the different shipments in adjusting the total expenses, though I believe that such discrimination is rarely made by them in this country.\*

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\* The ship "Amelia" was wrecked near Havre. The captain, aided by some men and carts from the shore, saved the effects of the seamen and passengers and some boxes of merchandise, and among them a box of jewelry which he himself carried ashore in his boat. The next day, finding the ship could not be got off, Messrs. VALLET and LUXEUR, by the general consent of the agents of the respective underwriters, undertook to save the cargo. This they succeeded in doing, or in saving the most of it. The case does not show that there was any special agreement to save the cargo, or part of it, for any specific sum, but only that these gentlemen had permission to go to work and save the property. They brought their suit against the underwriters on the box of jewelry so carried ashore by the captain, to compel contribution to the general expenses. The Court of Cassation decided, that the peril being common, all the proprietors must contribute to the expenses of the salvage in proportion to their respective interest in the cargo saved, without regard to the particular moment when or the means by which the saving of this or that particular box was accomplished, and that it would be impossible to discriminate and determine the expense of saving each particular object by itself, and that the fact that the jewelry was carried in the cabin, and so easily saved by the master, did not exempt it from liability to contribute to the expenses of saving the cargo.

*Dalloz Jurisprudence General*, 1864, page 70. *Journal du Palais*, vol. 75, 549—Astor Library.

There was plainly error in this decision; for the box had been saved and separated from the rest of the cargo before the plaintiffs commenced work. The plaintiffs did not save the jewelry at all. I doubt also the correctness of the principle



The question, whether the *damage* to ship and cargo caused by a voluntary stranding should be allowed in general average or not, excited more interest among the members of the Congress at York than any other question before it. Most of the members admitted, that in principle it is allowable if the ship should afterwards be got off and resume her voyage with her cargo. Some claimed, that it was allowable in principle whether the vessel was subsequently refloated or not. Many of them argued, that its allowance gave rise to many abuses; that it was found by experience that the greater number of instances of pretended voluntary strandings were cases in which the ship was either uninsured or insured "free of particular average," and that it was impossible in many cases to distinguish between the damage caused by the stranding and the antecedent damage caused by accidental perils. The section finally agreed upon by the Congress declares, that when the ship is intentionally run on shore *because* she is sinking or driving on rocks, the damage shall not be allowed in general average. It contemplates the sacrifice of a vessel that is already *in articulo mortis*. It leaves the case of a voluntary stranding to avoid a capture, and all other cases not specified, untouched.

Mr. ARNOULD, a distinguished English writer, states the law on the subject of voluntary stranding, in England, to be, "where the ship is voluntarily run ashore to avoid capture, foundering or shipwreck, and is afterwards *recovered so as to be able to perform her voyage*, the loss resulting from the stranding is to be made good by general average contribution."\* The question has never

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which considers a miscellaneous cargo, owned by different persons, in a case of shipwreck, as an entirety, and which calls for an apportionment of the expenses of saving the whole cargo over the different shipments, according to values, without regard to bulk or the difference in the expenses of saving each shipment.

\* § 328.

been decided by the courts in England, and the uniform practice of the average adjuster is to disallow the loss or damage in general average.\* In France it is allowed in general average, provided the ship is got off with her cargo on board, or if, the cargo having been landed, she takes her cargo again on board and proceeds to a port of refuge or resumes her voyage.† But if the ship is lost there is no contribution. The Marine Ordinance of LOUIS XIV.‡ declares, that "if the jettison saves not the ship there is no ground for contribution." This provision of the ordinance, taken from the Rhodian law, was incorporated into the existing French code, and is found in many of the maritime codes of Europe. "Commentators are agreed," says M. CAUVET, "that the word jettison, as here used, is to be taken in an enlarged sense, and as an example of all sacrifices." If, therefore, the ship, though voluntarily stranded, is not saved, there is no contribution. "If the voluntary stranding is followed by shipwreck," says EMERIGON, "it is 'sauve qui peut'—'save who can.' "§ The new German code declares, that "damages caused by a voluntary stranding in order to avoid capture or sinking, are general average; but if the stranding was in order to avoid *sinking*, and the ship is not got off, or after being got off is found incapable of repair, the damage is not general average."|| The Spanish code declares, like the French, that "if the vessel be lost notwithstanding the jettison, the average shall be particular."¶ This language, taken substantially from the French code, is probably interpreted by the tribunals of Spain in the

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\* Baily, 75.

† M. Cauvet, § 345-7.

‡ Valin, Liv. 3, Tit. 8, *Du jet et de la contribution*.

§ Meredit's Emerigon, p. 475.

| § 708.

¶ Art. 933.

same manner, and, as a consequence, unless the vessel is saved, there is no contribution. The maritime codes of Holland, Norway, Sweden and Denmark all make damage to ship or cargo, caused by a voluntary stranding, in order to avoid capture or foundering or other imminent danger, to ship and cargo conjointly, general average, and this, so far as I can learn, without regard to the question whether the ship is subsequently refloated or not,\* and so also is the law in the United States.†

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[Carrying a press of Sail.]

"SECTION VI. Damage occasioned to a ship or cargo "by carrying a press of sail shall not be made good as "general average."

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Carrying a press of sail to keep off a lee shore or to avoid capture is considered, by the custom of England, Belgium and the United States, as an ordinary act of duty, and as using the sails for the purpose for which they were intended, and, consequently, as no sacrifice. The damage is rejected from general average in these countries. It is allowed by the custom of Denmark. In France the decisions of the courts are contradictory. The Tribunal of Commerce of Marseilles has decided, that when it clearly appears that the captain had ordered a press of sail, in order to avoid an imminent danger, with the certainty of the loss of his mast and sails, the loss or damage is general average.‡

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\* See codes in Appendix.

† ADAMS vs. BARNARD, 10 *Howard*, 270. 13 *Peters*, 331.

‡ CONVINGTON vs. ROBERTS, 2 *Bos. & Pull*, 378. *Frignet*, 390, 394. *Cauvet*, § 352.

The new German code declares, "that damage done to the ship, its appurtenances and the cargo, by carrying a press of sail, even when the press of sail was carried to avoid stranding or capture, is not general, but particular average.\*"

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[Port of Refuge Expenses.]

"SECTION VII. When a ship shall have entered a port of refuge under such circumstances that the expenses of entering the port are admissible as general average, and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port shall likewise be so admitted as general average; and whenever the cost of discharging cargo at such port is admissible as general average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. Except that any portion of the cargo left at such port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called on to contribute to *such* general average."

[Wages and Maintenance of Crew in Port of Refuge.]

"SECTION VIII. When a ship shall have entered a port of refuge under the circumstances defined in Section VII., the wages and cost of maintenance of the master and mariners, from the time of entering such port until the ship shall have been made ready to pro-

“ceed upon her voyage, shall be made good as general  
“average. Except that any portion of the cargo left at  
“such port of refuge on account of its being unfit to be  
“carried forward, or on account of the unfitness or in-  
“ability of the ship to carry it, shall not be called on to  
“contribute to *such* general average.”

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A departure from the course of the voyage to seek a port of refuge, in order to avoid an enemy, pirates, foundering, or any other impending peril threatening the common safety of ship and cargo, gives rise, in different countries, to numerous questions relating to the mode of adjusting the expenses incurred.

THE UNITED STATES.—When, in consequence of stress of weather, the vessel has sprung a leak, or has suffered other damage in the course of the voyage, whether of a general or particular average nature, or the crew has become disabled by sickness or mortality, or the stowage of the cargo deranged by some unavoidable accident, or some other disaster has occurred, and it becomes necessary to the safety and common benefit of ship and cargo to deviate from the course of the voyage, and put into an intermediate port to avoid the impending peril, or to repair or refit the ship, in order to be able to resume the voyage in safety, the pilotage and towage in and out, the regular port charges on entering and clearing, the cost of protest, consular and health officer's fees, the cost of surveys and the hire of extra men to pump the ship while the cargo is on board, are allowed for in general average.

If it is necessary to discharge the cargo, whether for the common safety or to repair the vessel, the expenses of unloading and reloading, including the wharfage or

dockage of the ship or goods, the conveyance of the goods to a warehouse, and the storage, damage to the goods caused by the unloading, the expenses of cooping casks and mending packages injured by the discharge and reloading, the agency commission for the custody and reshipment of cargo, and interest on money advanced for the common benefit, are general average.

The expense of wages and provisions of the master and mariners, from the time the vessel bears away from the course of her voyage to go into the port of refuge, to the time the ship is again ready for sea, is general average. The wages allowed are the wages agreed upon between the ship-owner and the master and mariners. Many large ships are sailed by the master at a nominal rate of wages and primage, or a per centage on the freight. The rule adopted by adjusters, in such cases, is to allow what the ordinary wages per month of a competent master would be for a vessel of a similar kind and class. The rule as to allowances for provisions is as follows: In New-York, the master one dollar a day, the mates fifty cents, the seamen each thirty; in Boston, the master one dollar, the mates fifty cents, the seamen twenty-five; in San Francisco, the master two dollars a day, the mates one dollar and a half, and the seamen thirty cents.\*

Commissions on disbursements, loss on exchange, bot-tomry premium, cost of bond, loss on sound cargo sold to pay expenses, are general or particular average, according to the nature of the case, and are apportioned in an ad-

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\* *PADELFORD vs. BOARDMAN*, 4 *Mass.* 548. *WALDEN vs. LE ROY*, 2 *Caines*, 263. *Dixon's Marine Ins. & Av.* 100.

As between the ship-owner and his underwriter, wages and provisions and other expenses of a voyage to a port of necessity, for the purpose of making repairs, constitute a general average, though there may be no cargo on board. *POTTER vs. OCEAN IN. Co.*, 3 *Sumner*, 27.\*

justment of average to each interest benefited. If there be a profit on the sale of cargo, it belongs to the owner of the cargo.

When the cargo is discharged and in a place of safety, the expenses of repairing the ship, and the incidental expenses, such as surveys on the ship, discharging and reloading ballast, towing her to the place of repairs and back to the place of reloading, dockage, &c., are a particular average on the ship, unless the damage to be repaired is itself a general average; the cost of repairs following the nature of the damage.

If, on a regular survey, the vessel be condemned and the voyage abandoned, the general charges thenceforward cease, and the subsequent charges become special to the vessel or cargo, for whose benefit they were respectively incurred.

ENGLAND.—In England the following port of refuge expenses are admitted in general average: The pilotage or towage in, harbor and light dues, quarantine and health dues, use of warps and tackle, getting the vessel into harbor and mooring her there, wharfage, custom-house entries, telegraphic messages, the first survey held to determine the condition of the vessel and what ought to be done, the expenses of discharging the vessel and putting the cargo in a warehouse, when such discharge is necessary to repair the vessel, to cool the cargo or restow it when shifted by perils of the sea, the expense of noting and drawing the master's protest.

The cargo being separated from the vessel and put in a place of safety, the general average expenses cease, and the rent of the warehouse, insurance on the cargo against fire, surveys upon the cargo, drying, repacking and cooping, are a particular average on the goods.

The expenses of conveying back the goods from the warehouse to the shipping place, the wharfage and quay dues, the lighterage on board, the labor of reloading, stevedores, restoring metage at reshipment, use of screws for cotton cargoes, pilotage out of harbor, boats and men assisting towage out, are particular average to the freight.

The ship is charged with the expenses of surveys held subsequent to the first and its repairs, except the repairs of damages, which are themselves a general average.

The agents' commissions on money advanced, bottomry premium, and loss on the sale of cargo to pay expenses, are applied as a per centage to all the columns of disbursements, *i. e.*, are either particular or general average, according to the nature of the loss or expenses.\*

The wages and provisions of the crew are not regarded as an average, either general or particular, but are to be paid by the ship-owner as an ordinary expense of navigation.

English average adjusters heretofore, and at the present time, as I believe, adjust port of refuge expenses in the manner above given. Yet, in 1865, the Queen's Bench decided that the expenses of unloading and reloading the cargo for the purpose of repairing the ship, that she might be capable of proceeding on the voyage, are general averages.† If unloading and reloading are general averages, in principle, the storage must be also. Admit the storage and reloading in general average, and the English practice would agree with the American, in adjusting port of refuge expenses, in almost every particular, except as to wages and provisions of the crew.

FRANCE.—There have been, in years past, in the dif-

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\* *Hopkins*, 45. *Baily*, 179—80.

† *HALL vs. JANSON*, 4 *Ellis & Black*. 500.



ferent ports of France, great diversities in the manner of adjusting port of refuge expenses, and very respectable authority may be found, in the decisions of their courts, and in the opinions of their jurists, for adjusting these expenses in almost every variety of ways.

"When I was a student," says M. DE COURCY, "I remember to have seen, at an examination of the law class, the professor of the Code de Commerce divert himself very irreverentially at the expense of his old colleague, the professor of the Roman law, who was always laboring to reconcile the irreconcilable texts of Caius, Ulpian and Tribonian. The professor of the Code de Commerce, changing the role, presented to the student undergoing the examination, two Latin texts, in appearance very contradictory, and asked him to reconcile them. The poor young man hesitated, labored and sweated under the task, and could come to no conclusion. At last the questioner took pity on him, and, interrupting him, said:

"You need give yourself no more trouble. These two texts are simply irreconcilable; and this is what you ought to have answered"—

"The Roman law," he added, whilst the professor of the Roman law cast at him angry looks, "is full of these manifest contradictions." I am reminded of this anecdote every time I see the advocates, commentators, and even the magistrates themselves, laboring to reconcile Articles 400 and 403 of the Code de Commerce.

Article 400 says, "the expenses incurred, after due deliberation, for the common benefit of the ship and cargo, are general average." Article 403 says, "the expenses, resulting from every going into a port of refuge; occasioned by a *leak* to be repaired, are particular average." Now to apply the law to the facts: A ship, in the course of her voyage, by the violence of the wind,

springs a leak. This leak, if the pumps cannot keep it down, or if the crew become exhausted, evidently compromises the fate of the ship and cargo; for all would be lost if the ship should sink.

The captain decides, as a measure of safety, to go into a port of refuge. He is careful to put into his protest that this measure is taken "after due deliberation, for the common benefit and safety of the ship and cargo." Arrived in port it is necessary, in order to repair the leak, to unload the cargo, store it, and reload it when the leak is repaired. Two kinds of expenses are incurred: 1st. Those of the repairs of the ship. 2d. Those of unloading, storing and reloading the cargo, with all the accessories of commissions, port charges, pilotage, towage, &c. The captain borrows the amount of the expenses on a bottomry bond, and arrives at his port of destination. Now, the question is, how to divide and class these expenses according to Articles 400 and 403 of the code? Three arbitrators or despacheurs are nominated by the Tribunal of Commerce to make the adjustment, or rather, I will suppose four, in order to put into the mouth of each the four opinions entertained.

"There was," says the first, "due deliberation to go into a port of refuge for the common safety; consequently, all the expenses, without distinction, are general average. So says Article 400, expressly."

"The going into port," says the second, "was caused by a leak to be repaired; consequently, all the expenses, without distinction, are particular average to the ship. So says Article 403, expressly."

"Take care," says the third, "Article 403 declares, it is true, all the expenses to be particular average, but it does not add, as you do, *to the ship*. The last clause of the article declares the expenses incurred for the ship alone, or for the cargo alone, to be particular average.

It is necessary to distinguish between the two sorts of expenses. The expenses of the repairs are particular average to the ship. The expenses of unloading, storing, reloading and commissions on the cargo, are particular average to the *cargo*."

"Without doubt," says the fourth, "it is necessary to distinguish between the expenses, but not as the third arbitrator does ; for good sense repels the idea of considering as done, in the interest of the cargo alone, the expenses of unloading, storing, &c., occasioned by the necessity of repairing the ship. These are essentially common expenses. The distinction, in conformity with the nature of things, is as follows: A ship has met with a disaster in a storm ; the mast has been broken, sails split, a leak sprung. The expenses of these repairs are particular averages to the ship. The same storm has damaged the cargo. The water has penetrated the hold, wet the coffee and dissolved the sugar. These damages are particular average to the merchandise. But once the tempest appeased, a peril remains, common to the ship and cargo—that of the leak. The going into a port of refuge becomes then necessary as a measure of common safety. The unloading becomes necessary to repair the ship ; consequently, all the expenses are general average, except the expenses of the reparations of the ship and the particular damage suffered by the cargo."

"Ship-owner and cargo-owner go to law on these questions, and Articles 400 and 403 are bandied about, from one to another, without ceasing, in the clatter of discussion. The judges render contradictory decisions. For a long time the decisions of the courts of the northern departments were opposed to those of the southern. The Court of Cassation itself misjudged in several cases and enunciated contradictory principles. Now, what is more injurious to the interests of maritime

commerce than this uncertainty in the law? What more sad for captains, who are constantly urged to adjust the averages, than interminable lawsuits, carried up by appeal to the court of last resort upon questions of every day occurrence.

"I hesitate not to say, the adjustment ought to be made according to the opinion I have called the fourth. It is the manner of adjusting adapted by all the merchants, special arbitrators and professional despacheurs in our great ports, who do not give themselves too much trouble about the texts of the law. The collision of discussion and the power of good sense have at last obtained for it the sanction of the courts of the south, and more recently that of the Court of Cassation—the final court of resort. It is a brilliant triumph of the spirit over the letter; for it is difficult to pretend not to know that this opinion is contrary to the letter of Article 403."

The decision to which M. DE COURCY refers as having been made in the Court of Cassation, was made in the case of the ship "Moses Taylor," in 1861. The suit originated in the Tribunal of Commerce of Marseilles, and was carried by appeal to the Court of Cassation. The court decided, that "the expenses of hiring men from the shore to pump the vessel, of unloading, storing and re-loading the cargo, in a port of refuge, and their accessories, are general average, when a leak caused by a tempest necessitates the going into port, in order to avoid a serious peril to the ship and cargo and the lives of the crew, and the master and crew, in view of the peril, deliberately determined to enter such port for the purpose of repairing the ship in order to be able to continue the voyage."\* The reporter says, that the questions involved in the decision have been very much contro-

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\* *Journal du Palais*, vol. 72, page 9, Astor Library. See, also, case of *MILÓ C. GIBBS*, vol. 74, page 618.

verted ; and he refers to some eight or ten contradictory decisions of the Imperial courts of the different departments.

But there have been later decisions in the Court of Cassation on the subject, and I think the rules of law, as laid down by that court in 1864, may be thus stated : Whenever, in consequence of a leak or other imminent peril to both ship and cargo accidentally occurring, the master, upon consultation with his crew, duly entered in his log-book and protest, determines, for the common safety, to go into a port of refuge, and the facts show such determination to have been judiciously taken, then the expenses of going in and coming out and the port charges are general average ; and if the unloading of the ship is necessary to the preservation of the cargo as well as to repair the ship, then the expenses of unloading, storing and reloading the cargo are general average. But if it does not appear that the cargo was in immediate peril of damage, and that it was for the safety of the cargo that it should be unloaded as well as for the benefit of the ship, then the unloading, storing and reloading will not be general average, but a particular average to the ship. The captain must keep his vessel in repair ; and if it is necessary to unload the cargo in order to repair damages caused by accident or sea peril, the expenses of unloading, storing and reloading the cargo are to be charged to the ship, unless such unloading was also necessary to preserve the cargo from damage.†

The expenses of going into a port of refuge to avoid a tempest or an enemy are general average, to procure provisions are a particular average.\*

Damages caused by accidental stranding in going into such port, and damages to the goods in the warehouse by fire or water, are particular average.‡

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\* *Cauvet*, 362.

‡ 372.

† The ship *L'Amiral Casey*, in going to sea from Calcutta, stranded on the bar.

Article 400 of the code makes the wages and provisions of the crew general average during the reparations of the

She was lightened by a steam-tug, got off and carried back to Calcutta. Surveyors appointed by the French consul ordered her to be discharged and put in dock for examination, and a subsequent survey ordered her bottom to be repaired. The captain stated in his protest that the vessel, although hard and fast aground, was not strained and *did not leak*. In a suit brought by the captain to recover in general average contribution the expenses of getting off the vessel and conveying her back to Calcutta, and of unloading, storing and reloading the cargo, the first court decided that these expenses were general average; the second court, on appeal, decided they were not, but were a particular average to the ship; the third court, the Court of Cassation, affirmed the decision of the second. In delivering its opinion the Court of Cassation said: "Every expense incurred for the ship benefits the cargo; but in order that it may be classed in general average, it must proceed not from a voluntary act isolated and special to the merchandise or to the ship, but must be incurred simultaneously for the common safety of the ship and cargo, and that such is the express meaning of Article 400 of the code. That although the unloading of the cargo from a ship accidentally stranded, or other expenses incurred to relieve the ship, may, in certain circumstances, be considered as done in the interest of the ship and cargo, and so classed as general average, yet the court below, who were the judges of the fact, having found as a fact that the ship was carried back to Calcutta, in the interest of the ship alone, and not in that of the cargo which was menaced by no imminent peril, the decree refusing to admit the expenses of returning to Calcutta, and of unloading, storing and reloading the cargo in general average, is not erroneous." *Dalloz Jurisprudence General*, 1864, p. 70. *Journal au Palais*, vol. 75, 549, Astor Library.

The ship *Ville d'Ageu* sailed from Toulon, under a charter-party to proceed to Hong Kong, there to receive orders for her ultimate port of delivery. The ship encountered heavy weather in the Mediterranean, and afterwards, in passing around the Cape of Good Hope, sprung a leak. The captain and crew, upon proper deliberation, determined to go into the Isle of Mauritius for repairs; but while on the way there the weather having become better and the leak not increasing, a new deliberation was had, and it was determined to resume the original voyage to Hong Kong, where in due time the ship arrived. The captain there found orders to proceed with his cargo to Wou-Song; but he could not obey these orders without first repairing his ship. Repairs had become indispensable; and to make these, the ship had to be unloaded in part. After the ship was repaired she proceeded in safety to the port of delivery. In adjusting the averages in the inferior court, the ship was charged with the repairs as a particular average; the expenses of unloading, storing and reloading the cargo, and the wages and provisions of the crew were charged in general average. On appeal to the Court of Bordeaux, this adjustment was set aside as erroneous, on the grounds that the ship did not go to Hong-Kong as to a port of refuge and in order to avoid an actual and imminent peril, nor upon a deliberation motivee for the common benefit and safety of ship and cargo, but in obedience to the charter-party; that the partial unloading of the cargo was done before

ship, of damages voluntarily suffered, if the ship is chartered by the month, and particular average if the ship is chartered by the voyage. If the ship were chartered by the month, it used to be supposed that the hire or freight was suspended during the making of repairs. It was thought to be just, therefore, that the charterer, as he paid no freight during this time, should contribute to the support of the crew. But in practice the charterer does pay freight during the necessary detention: "And now," says M. Cauvet, "in spite of the difficulties of the text, and some ancient decisions to the contrary, the wages and provisions of the crew are classed as particular averages on the ship, whatever may be the cause of the detention or the mode of affreightment." If the freight is insured, as it frequently is in France, on the honor of the underwriter, its insurance being void by the code, the underwriter on freight pays the wages and provisions as an average on freight.\*

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any survey of its condition, and with a view to lighten the ship in order the better to discover the injury to the hull; that the necessity for repairing the ship made it necessary to unload the cargo; and that in unloading, the interests of the ship was alone concerned, and not the cargo; and that if the cargo derived any benefit from the unloading and repairs, such benefit was incidental only and not the motive to such unloading and reparations. The Court of Bordeaux held that the repairs, the expenses of unloading, storing and reloading the cargo, were, under the circumstances, together with the wages and provisions of the crew, particular average, to be borne by the ship. On an appeal to the Court of Cassation, it was admitted by the appellants that the reparations of the ship were particular average, but it was contended that the expenses of unloading, storing and reloading the cargo were voluntarily incurred for the common safety, and with a view to avoid a future peril; that Hong-Kong was not the port of destination, and that the delay there should be considered as a forced going into a port of refuge (*comme une relâche forcée*) on account of the repairs indispensable to be made in order to continue the voyage, and that this delay, in order to make repairs, was for the common interest of ship and cargo; and that consequently the expenses of unloading, storing and reloading the cargo ought to be held to be general average, as also the wages and provisions of the crew during the remaining detention. The Court of Cassation affirmed the decree of the Court of Bordeaux. *The Ville d'Ageu Journal du Palais*, vol. 75, 189, Astor Library.

\* *Cauvet*, 373

Interest, commissions on money advanced, differences of exchange and bottomry premiums, are divided, *pro rata*, upon the different columns of expenses.\*

BELGIUM.—The commercial code of Belgium is the same as that of France. We have seen the difficulties of reconciling the different interpretations of Articles 400 and 403 of that code; and while conflicting decisions on the subject were made, and conflicting customs grew up in the different ports of France, Antwerp built up a custom of her own, which differs in some particulars from any which have prevailed in France. It is more like the custom in England, but not the same. By the custom of Antwerp, the community of interest between the ship and cargo is considered as interrupted from the moment the cargo (if it is necessary to unload it) is separated from the ship or from lighters in order to be landed. This community of interest is restored from the moment the cargo is put on board the original ship, or on board lighters to be transported there. Consequently, the expenses of going into port, of coming out, the hire of laborers employed to pump the ship as long as the cargo is on board, judicial expenses, fees of consuls and notaries, the commissions of agency, are general average. Commissions for the advance of funds, bottomry premium, interest and loss upon goods sold to procure funds, are divided, *pro rata*, between the different classes of average according to their respective amounts.

The cargo is charged with the expenses of landing and conveying to the warehouse, the storage, surveys on it, and the expenses of putting the cargo on board again, or on board lighters to be carried to the ship.

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\* *Journal du Palais*, vol. 74-613. *Cauvet*, 374.



The wages and provisions of the crew are rejected from general average. If the freight is insured, they are considered as a particular average on the freight, and are paid by the underwriter on freight, as in France. It is in the case only of a landing of the entire cargo that the expenses of landing, storing and reshipping the cargo are rejected from general average. When there is a landing of part only, as in order to take out a broken mast and put in a new one, the expenses of the landing, storing and reshipping such part are allowed in general average.\*

HOLLAND.—The code of Holland declares, that the pilotage or other expenses of entering and departing from a port of refuge, the expenses of unloading the vessel, the hire of warehouses and depots in which the merchandise is deposited which cannot remain in the vessel during the refitting, the wages and food of the crew during the time the vessel is constrained to remain in port, the marine premium on money borrowed on bottomry to pay general average expenses, or the premium to insure such expenses, the loss, by a sale, of part of the cargo to pay general average expenses, and the expenses of adjusting or stating the general averages, are all general averages.\*

GERMANY.—The new code lately adopted by the German States and the free towns of Lubec, Hamburgh and Bremen, reads as follows:

“If the vessel has put into a port of refuge in order to avoid a common danger threatening the ship and cargo

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\* *Antwerp Customs*, by Messrs. EUGLES and VAN PERBOURGH.

† Art. 698.

in case the voyage were prosecuted, more particularly if the putting into port is in order to repair damage done to the ship during the voyage.

"To general average belong, in this case, the expenses of entering and leaving, the expenses to the ship itself during the stay, the wages and provisions of the crew during the stay, also, the expense of lodging the crew on shore, of and as long as they could not remain on board; further, if the cargo must be discharged as a consequence of the cause which led to the ship putting into the port of refuge, the expense of discharging and unshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on board again. The several charges for detention are only taken for the time that the cause of putting into the port of refuge remains in force. If the cause is to be found in a necessary repair of the ship, the charges for detention are only taken for as long a time as that in which the repairs might have been completed."\*

SWEDEN.—See code in the Appendix.

NORWAY.—See Appendix.

DENMARK.—Expenses for ship and cargo, in consequence of an intermediate detention at a port of refuge, say harbor dues, labor in discharging and reloading cargo,

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\* Art. 708. By the custom of Lubec and Hamburg, provisions during detention in ports of refuge are allowed for at uniform rates, as follows: During detention at ports on the continent of Europe, 1s. 9d. a day to the master and 10½d. to each of the crew; during detention in ports in Great Britain and out of Europe, 3s. a day to the master and 1s. 3d. to each of the crew. In Bremen 9s. 2½d. a week to the master and an equal amount to the mate, and 6½d. a day to each of the crew, irrespective of the country or the port.

*Guide Generalis des Assurances Maritimes*, page 374.

warehouse rent for the cargo, ordinary wages and provisions for the captain and crew, and pilotage, are allowed in general average.

SPAIN.—Nothing can be more jejune and unsatisfactory than the Spanish commercial code in relation to averages, except the French. Like the French code, it gives a list of particular averages, in which it includes “all damages happening to the ship or cargo by the accidents of the sea or force major; the wages and provisions of the crew while the ship is under arrest by lawful authority, if the ship was freighted by the voyage; the expenses that the ship has incurred in going into a port to repair the hull or rigging or to obtain provisions; the wages and provisions of the crew while the ship is in quarantine; damages from accidental collision, and generally all expenses incurred in repairing injuries to the ship or the cargo which have not enured to the benefit, or have not been incurred for the general good of all the interests in the ship and cargo.” It then classifies as general averages “all damages voluntarily suffered by the ship, and all expenses incurred on purpose to save the ship, its cargo and any of the effects, from a risk known and real.” It then gives a list of general averages, such as jettisons, cutting away masts, effects or money given to redeem the vessel and cargo from the enemy or pirates, the wages and provisions of the crew, when the affreightment has been by the month, during the time of the arrest of the ship by authority or force major, and during the time of repairing damages voluntarily suffered for the common benefit of all the interests. These provisions are substantially those of the French code, and they involve the same difficulties of interpretation. They declare, like the French code, Article 400, that all expenses incurred on purpose to save

the ship and cargo from the effects of a known risk are general averages; and, at the same time, they declare, like Article 403 of the French code, that the expenses that the ship has incurred in going into a port of refuge to repair the ship are particular averages. There is, however, some difference in the language of the two codes. The French code says, in general terms, that expenses *resulting* from going into a port of refuge to repair a leak, shall be particular average; whereas, the Spanish code says, that the expenses that the *ship* has incurred in going into port to repair the hull or rigging, shall be particular average.

Besides, the Spanish code contains a separate and distinct chapter on the subject of putting into ports of refuge. After declaring the causes which justify such deviation, such as a well-founded fear of enemies or pirates, accidents happening to the ship which render it incapable of continuing the voyage, it declares, in general terms, "that the expenses of a necessary deviation into a port of refuge shall always be on account of the ship-owner and the freighter," without specifying in what manner these expenses shall be divided between them.\*

PORTUGAL.—The code of Portugal, like that of Spain, contains a distinct chapter on the subject of going into a port of refuge. It contains the same general provision, declaring that the expenses of a necessary arrival in such port shall be on account of the ship-owner and freighter, without specifying in the immediate context the manner of deciding them. But, according to the *Concordance outre les Codes*, by ANTHONIE DE ST. JOSEPH,† and the

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\* *Code de Commerce* of Spain, translated into French by VICTOR FOUCHER, King's Advocate-General. Astor Library.

† Astor Library.

*Manuel de l'assuré*, by AUGUSTE MOREL, Articles 1816 to 1829 inclusive of the Portuguese code are the same as Articles 696 to 712 inclusive of the Dutch code, and this, we have seen, declares that the expenses of pilotage in and out, wages and provisions of the crew, and the storage of the cargo, are general average.

In a case of collision, the Portuguese code declares, that when it is doubtful which vessel was at fault, the damage shall be divided in the form of a general average between each ship and each *cargo*.

BRAZIL.—[The writer of the following letter has had much experience in the business of adjusting averages at Rio Janeiro :]

RIO DE JANEIRO, 21st April, 1865.

WM. V. V. LEDGERWOOD, Esq.,

Present.

DEAR SIR :

Complying with your request to furnish to the Hon. Mr. SEWARD the information required by Mr. MARVIN, of New-York, regarding the manner of adjusting general average claims in this country, I beg to reply to the questions put by Mr. MARVIN as follows: 1st. In 1850, Brazil adopted a commercial code and instituted a Tribunal or Chamber of Commerce, where all commercial suits are tried. The code is a compilation of the Dutch, French and other European codes, the Dutch, however, prevailing. Under Titulo VIII. and Article 666 to 796, it treats of insurance matter, but it must be confessed that it does so very imperfectly, as a reference to said code will show. This evil might be corrected or palliated if the sentences of the Tribunal served as "Arrêts," but unfortunately it does not happen so; for what is *law* to-day, by a change of judges to-morrow is quite the contrary, so that the sentences of the Tribunal of Commerce are often contradictory. 2d. When a loaded vessel puts into a port of refuge and discharges her cargo, all the expenses of the discharge, storage and reloading are considered general average; as are also port dues, tonnage and all other expenses resulting from the "relache." The wages and maintenance of the crew, from the day the vessel's course was altered to seek a port of refuge till she is

again *supposed to be placed on the same spot*, and the lodgment of the captain and crew on shore (if they can't remain on board,) are general average. The Art. 765 of the code, however, stipulates that if the "relache" be occasioned by the unseaworthiness of the vessel, or fault or neglect of the captain or crew, all these expenses are to be paid for by the ship or her captain.

In apportioning the general average, the ship contributes with her insured value, or for her estimated value in her damaged state, *plus* the amount she receives from the general contribution. The freight contributes with *half* of its amount, and the cargo (if a mixed or general one) with the invoice amount, or (if consisting of only one article, such as sugar, flour, coal, &c., whose net value can be easily ascertained) with the net proceeds, the latter being the more equitable way, for it is clear that the *net proceeds* of the cargo is what is saved by the voluntary sacrifices made. In speaking of "net proceeds," I do not include commissions.

The Art. 614 of the code obliges the captain of a vessel (Brazilian, of course) condemned in an intermediate port, to charter, *at his own charge*, one or more vessels to carry on the cargo to the port of destination; but, if within sixty days of the condemnation, he cannot find another vessel, he has a right to abandon the cargo to the local authorities, and consider the voyage ended, claiming freight, *pro rata*, for the distance run. The Art. 766, § 5, declares that in this case the excess of freight, expenses of discharging, storage and reloading are particular average of the cargo.

In adjusting the sacrifices made by the ship, I make an abatement of one-third on the cost of the new objects used to replace the old; on anchors no allowance is made. Where I am not obliged to follow the commercial code, I adopt, as nearly as I can, the custom used in England.

There are not, in this country, professional average adjusters; and as many incompetent persons are often appointed to do this work, it follows that there is no uniformity in the principles adopted, and that very few of the adjustments are correct. It may not be foreign to the subject to state that *very few* (or rather *none*) adjustments are made with the intervention of the judicial authorities, the delays, expenses and annoyances being so great that all try to avoid them. The plan adopted is: The captain appoints one arbitrator and the receiver of the cargo another, and the two make out the adjustment, which is accepted by all.

It is impossible, in a note of this kind, to say what is and what is not put down to general average; but I shall be glad to furnish copies of

some of the adjustments I have made, which have been accepted without demur in England, France, Hamburgh, &c., and which will more clearly elucidate the matter.

I trust these hasty remarks may prove useful; and tendering my further services in any way they may be made available,

I remain, Dear Sir,

Yours very truly,

E. A. HARPER,

*Manager Ins. Co. "Seguridade."*

CUBA.—[The writers of the following letter are experienced professional average adjusters in the port of Havana:]

HAVANA, July 20th, 1865.

WILLIAM MARVIN, Esq.,

*New-York.*

DEAR SIR:

In compliance with the offer made you on the 14th inst., we have now the pleasure to furnish you the desired information about the manner in which, according to usage and customs of this place, the liquidations of averages are effected, a system which, although admitted by our merchants and the Tribunal de Comercio, is not strictly adjusted to our code.

This anomaly is owing to various causes, and chiefly to the interpretation given to some of the articles of the code; and as article No. 966 says: "Las disposiciones de este titulo no obstaran para que las partes hagan los convenios especiales que tengan á bien sobre la responsabilidad, liquidacion y pago de las averias, en cuyo caso se observaran estos puntualmente aun cuando se aparten de las reglas que van establecidas."\* This has given occasion to the practice, that taking for a basis Part 1st of Article 936 of the code, reading "Averias gruesas ó comunes son generalmente todos los daños y gastos que se causan deliberadamente para salvar el buque, su cargamento ó algunos efectos de éste de un riesgo conocido y efectivo,"† as general average are liquidated all expenses of

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\* *Translated.*—The requirements of this article will not prevent the parties *in interest* from making such special agreements as they may think proper as to the liability for settlement and payment of averages; in which case these *agreements* will be punctually observed, even if different from the rules already established.

† *Translated.*—General or common averages consist generally of all the damages and expenses deliberately incurred to save the vessel, her cargo, or part of her cargo, from an evident and actual risk.

in and outward pilotage, port dues, expenses of discharging, storing and reshipping the cargo, and all other extraordinary disbursements, including wages and maintenance of the crew during the term of the necessary detention in an intermediate port.

If the cause of the entrance into port is a leak or other accidental damage to the vessel, disabling her to continue the voyage, the expenses of repairs and refitting are distributed in the following proportion: two-thirds as simple or particular average, *i. e.*, for account of insurers of the vessel, and the other third to be borne by the owner, as a compensation for the apparel worn out and replaced by other new ones, which have improved the condition of the vessel in every respect.

If the entrance in port to repair damages is caused by the consequence of deliberate acts for the general benefit, such as cutting away a mast in a tempest, loosing rigging and sails, or throwing overboard part of the cargo or ship's apparel to relieve her, all the *expenses in port* are liquidated as general average; of those for refitting the vessel and replacing apparel sacrificed, two-thirds are charged to the general average, leaving the remaining third to be borne by the vessel's owner for the same considerations explained in the foregoing case. The portions of the cargo thrown overboard, at their invoice cost, with, moreover, the freight for the same due to the vessel, are entirely charged to general average. Regarding anchors and chains, it is not customary here to make deductions for wear, but their entire value is indemnified.

Article 970 is in contradiction to what is declared in Article 936 in the part above cited, and thus it is not considered valid, except in cases where the entrance originates from want of water or provisions. Entrance into port on account of sickness among the crew, or contrary boisterous weather, since being adopted deliberately by the captain and officers to save vessel and cargo from a known risk, the subsequent expenses are considered as extraordinary ones which all the parties interested must bear, and, therefore, are liquidated as general average.

The difficulty of appraising with exactness the values in the port of discharge, as prescribed by the Code, of a cargo composed of distinct objects, has led to the introduction of the custom of accepting the invoice cost as the value for contribution of the merchandise. The vessel contributes according to her value in her damaged state, with the addition of what may have been put to her credit by general average for apparel sacrificed; and freights with one-half of the amount resulting from the bills of lading.

Bottomry loans in a port of distress are considered as extraordinary expenses and corresponding to general average. The premium on the



amount taken is distributed in the corresponding proportions between the owner of the vessel, the particular and the general average.

The foregoing will give you an idea of the system observed in this place in adjusting questions of this nature, which generally are settled privately, out of considerations of economy in expenses and time.

In effecting such liquidations judicially by the Tribunal de Comercio, subject to the Code, results the difference, that the expenses of discharging, storing, reshipping the cargo, and other disbursements occasioned thereby, would belong to particular average of the cargo, according to Article 775 of the Code. Salaries and maintenance of the crew would fall exclusively to the charge of the owner; but law expenses, which would not be less than a thousand to fifteen hundred dollars, according to the nature of the case, and taxer's fees of cargo, vessel, and averages fixed at one per cent. on the amount of the valuation, would fall to the general average.

In consideration of these dispositions, the system as above explained has been generally adopted here as the most economical and equitable for all interested.

We sincerely hope that our information may serve fully to satisfy the purpose you have in view, and shall, with many thanks, receive the kindly promised copy of the interesting report you are about to publish.

We are, Dear Sir,

Your very obedient servants,

N. DEULOFEU.

YENO. AMENABAR.

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[Community of Interest.]

It will be perceived that the York bill declares, that the port of refuge expenses therein named, and which we have been considering, shall be general average "when the ship shall have sailed thence with her original cargo, or a part of it." It seems to follow from this qualification of the rule, that the Congress did not intend that a portion, at least, of these expenses should be considered as general average, unless the ship did sail thence with her original cargo, or a part of it. The bill assumes, that the expenses of entering the port are general averages. At

what point, then, in the progress of the business, will the general average expenses cease, according to the present maritime law, when the voyage is not resumed with the cargo on board, but is abandoned on account of the in-navigability of the vessel, or other necessity? When the community of interest is broken up, would be the answer, according to all the theories, and this takes place in a port of refuge, according to the Belgic customs, when the cargo is landed, and, according to the English, when it is stored. The Court of Appeals in this State decided in 1860, that it continues to the time of a complete and final separation of the merchandise from the ship, not in any event to be re-united, or to the time of the abandonment of the voyage. The case was this: The ship *Galena* being on fire in her hold at sea, the master transferred a quantity of specie on board a Danish brig, and both vessels proceeded into a port of refuge, where the specie was landed and deposited in bank by the master of the ship on board of which it was originally shipped. Fire engines were then employed to pump water into the ship to extinguish the fire, whereby the ship and cargo were damaged. The ship was unloaded, the cargo stored, and the voyage afterwards abandoned by the master. It was decided by the court, that the specie was liable to contribute in general average to the damage done the ship and rest of the cargo by the water pumped into the ship to extinguish the fire, to the expenses of the fire engines and of unloading and storing the cargo, and the wages and provisions of the crew up to the time the master abandoned the voyage.\* Justice SELDEN, in delivering the opinion of the court, admitted the rule to be, that goods, or any interest, were

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\* NELSON vs. BELMONT, 21, N. G., 36. S. C. Duer, 310.

not liable to contribute for expenses incurred subsequently to their being *at risk*; but he argued, that the specie was at risk—the risk of the loss of the voyage. “In determining this question,” he said, “it will be necessary to recur to the principle upon which general average is based. That principle is, that where several persons are engaged in a joint enterprise, whatever is necessarily done for the common benefit ought to be done at the common expense. It is of the essence of this principle that it looks upon the enterprise as a whole, as an entirety. It is true, that in apportioning the loss, regard is had to the interests of the respective parties. But in other respects, no separate interest is recognised. Until, therefore, some portion of the property has been separated from the rest, so as no longer to have any interest in common with it, every risk which affects the enterprise as a whole must be regarded as affecting each portion of the property engaged.

“Such a separation may, and frequently does occur, in the course of a voyage. For instance, in a case of jettison, the goods jettisoned do not contribute for any damage afterwards done to the residue of the cargo. If the goods forming a part of the cargo are sold for the necessities of the ship, or are delivered to the owner or consignee either before or after the arrival of the vessel at its port of destination, and before the occurrence of a general average loss, they do not contribute. So a separation may occur, through the withdrawal by the owner of a portion of the goods before the termination of the voyage. This every owner has in general a right to do at any time, on payment of freight for the entire voyage, and the goods thus withdrawn are exempt from contribution for any subsequent loss, upon the principle that it is the goods at risk only which contribute.

“My conclusion, therefore, is, notwithstanding the case

of *BEVANS vs. THE UNITED STATES BANK*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert it has been commenced, can succeed in so separating his own property from the rest that it is no longer in any sense at risk, he cannot be held liable to contribute to the expenses subsequently incurred. But in order rightly to apply this rule, it is necessary to ascertain the full scope of the term 'at risk.'

"Physical destruction, or direct physical injury to the ship or cargo itself, is not the only risk to which property so situated is exposed. Its value depends, or at least is supposed to depend, in some degree upon the successful prosecution of the voyage. Whatever threatens the voyage, therefore, is a peril to the entire property. Until that is broken up, unless the property claimed to be exempt is not only separated from the rest, and put in a place of safety, but entirely disconnected with the enterprise, it must be regarded as still at risk and liable to contribute. If the voyage is not abandoned, and the property, although separated from the rest and removed from the ship, is still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains, and whatever is done for that common interest, must be done at the common expense.

"The result of these principles when applied to the present case is plain. It turns entirely upon the nature and object of the separation of the specie from the ship *Galena* and from the residue of the cargo, when it was placed on board of the Danish brig. I entertain no doubt that such a severance as would have exempted it from all liability to contribute to the subsequent expenses might

have been effected by the master of the vessel in the same manner as by the owner himself, had he been present. The master is the agent and representative of each of the owners in respect to their several shares of the property under his charge, and has the same right which the owners themselves would have to take measures for its preservation.

"If, therefore, the captain of the Galena had put the specie on board the brig, not in any event to be returned to him, but to be taken by the brig to its port of destination, and the latter had then been suffered to pursue its course, the specie would not have been subject to contributions for any subsequent expenditures to save the Galena. And notwithstanding the brig was employed to attend the Galena to Charleston, if it had been distinctly understood between the two commanders that the specie was committed entirely to the custody of the Danish captain, and was in no event to be restored to the care of the captain of the Galena, it would then also have been exempt.

"But the facts do not warrant this assumption. The case states that 'the specie was put on board the brig because it was safer there, as in case the fire broke out it might be too late to transfer it from the ship.' The brig was to accompany the Galena to Charleston, and there is nothing from which it can be inferred that it was the intention of the captain of the latter to relinquish his control of the specie. The fact that he reclaimed and took it from the brig as soon as he arrived in Charleston tends strongly to the opposite inference. It never ceased, therefore, up to that time, to constitute a part of the cargo of the Galena; and if the fire had been previously extinguished and the voyage resumed, it would, of course, have been again taken on board and carried forward by her.

“The case states, that while at Charleston the captain of the Galena determined to abandon the voyage. It follows, from what has been said, that up to that time the specie remained liable to contribute to the general average loss.”

The case of *NELSON vs. BELMONT* grew out of expenses consequent upon going into a port of refuge, and there discharging the cargo, and involved a decision of the point as to the time when, in the history of the transaction, the community of interest was broken up or dissolved, so as to cause the general average charges to cease. The case of *McANDREWS vs. THATCHER*, decided by the Supreme Court of the United States, at the December Term, in 1865, grew out of the expenses incurred in refloating a stranded ship, and involved a similar question. The case was this: The ship *Rachel*, laden with a general cargo, bound from Liverpool to New-York, after arriving inside of Sandy Hook in a heavy gale, on the 21st day of September, 1859, struck on the West Bank in the lower part of the harbor of New-York, and became fast. The master employed steam-tugs for two days to get the ship off without lightening; but failing in this, he lightened the vessel by discharging the cargo in lighters, and transporting it to its port of destination. The agents of the ship received the cargo, and delivered it to the consignees upon receiving from them the customary average bonds. The cargo being discharged, or all but mere remnants of it, and the ship settling fast in the sand, and the tide ebbing and flowing in her, the agent of the ship refused to authorize further expenses, and the captain and crew abandoned the ship, and left her where she lay, in charge of the agent of the underwriters on the ship, who had arrived at the ship a day or two before, and who had already procured oil casks to buoy the ship. The agent

of the underwriters continued his endeavors to refloat the ship until the 11th of November following, and on that day, by the assistance of two steamers, he succeeded in getting her free, and towing her to a marine railway for repairs. Examination there made showed that there were remnants of the cargo still left on board, and upon that discovery they were discharged and delivered to the consignees. The suit was brought by the ship-owner against the consignee of a part of the cargo to recover in general average his contributive share of the expenses of refloating the ship. It was conceded that the defendant was liable to contribute, in general average, to the expenses incurred in refloating the ship up to the time when the master abandoned the ship, and the agent of the underwriters on the ship took charge. But the question was, whether he was liable to the expenses subsequently incurred under the management of the agent of the underwriters?

The court decided—

“1. Except when the disaster occurs in the port of destination, or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable, has the right, and, if practicable, it is his duty to get off the ship, reload the cargo, and prosecute the voyage to its termination.

“2. When the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladen and stored in safety are not relieved from contributing towards the expenses of saving the residue; nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a

common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures.

“3. The rule is, that if the ship is also saved by the same continuous series of measures as those by which the cargo was saved, then the cargo is bound to the ship, and the ship to the cargo. They are so bound because the liability to such contribution continues until the part of the adventure claimed to be exempted is completely separated from the residue, so as to leave no community of interest remaining.

“4. The general rule is, that when the cargo continues under the control of the master, so that it may be taken on board for the purpose of prosecuting the voyage, the common interest remains.

“5. The plaintiffs in this case are not entitled to recover, because it appears not only that the cargo was delivered to the consignees, but that the series of measures employed by the master, and through which he saved the cargo, failed altogether to save the ship.

“6. They cannot recover, because the expenses in controversy were not incurred by the master, but by the underwriters of the ship, after the master had saved the cargo and abandoned the ship, and all endeavors to save her from the disaster.

“7. When the master abandoned the ship and all endeavors to save her, the separation between the ship and cargo became complete, and all community of interest was gone.”

The difference between the English and Belgian customs in relation to the point of time when the community



of interest, as it regards the adjustment of averages, should be considered as broken up, and the American custom, appears to me to be this. The English and Belgian custom is based on the idea that the motive or inducement to the general average act or expenditure *must be* the common "physical safety" of the ship and cargo at the time, without regard to the successful completion of the voyage, by the arrival of the ship and cargo together at their port of destination. It is based on common safety, not ultimate benefit. Hence, by the English custom, the landing and storing of the cargo in a port of refuge, and, by the Belgian custom, the landing of the cargo alone, interrupts or suspends the community of interest between the ship and cargo, and, consequently, all general average charges cease, until they are again reunited for the purpose of prosecuting the voyage. The cargo pays its own storage, and the freight, in England, pays the expenses of reloading. The ship pays the expenses incurred by it, including the wages and provisions of the crew during the detention. In Belgium the cargo pays its own expenses of storage and reloading, and the ship its own expenses, including the wages and provisions. The landing and storing of the cargo of a stranded ship, by the English law, interrupts or suspends the community of interest between the ship and cargo, so as to exclude from general average the expenses subsequently incurred by the master, in the prosecution of any new measures, in getting the ship off, notwithstanding the cargo may remain under the control of the master, and he may afterwards take it again on board, and carry it to its port of destination.\*

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\* *JOB vs. LANGTON*, 6 *Ellis & Black.*, 779. In this case the ship did not, in point of fact, carry the cargo forwarded, it having been sold or forwarded by another vessel; yet the parties in the case stipulated that the court should take the fact to be that the ship did carry on the cargo, and the court so took the fact.

It is very difficult to say upon what theory the French system proceeds, if a congeries of inconsistent practices and contradictory decisions may be called a system. Article 400 of the Code de Commerce reads: "Et en général, les dommages soufferts volontairement, et les dépenses faites d'après deliberations motivées pour le bien et salut commun du navire et des marchandises depuis leur chargement et départ jusqu' à leur retour et déchargement."\*

This article, as we have already seen, is diversely interpreted. The last interpretation placed upon it by the Court of Cassation seems to strike at the root of a very large class of cases before considered in France and in other countries to be general averages. In the case of the ship *L'Amiral Casey*,† the court said: "Every expense incurred for the ship benefits the cargo; but in order that it may be classed in general average, it must proceed not from a voluntary act, isolated and special to the merchandise or to the ship, but must be incurred *simultaneously* for the common safety of the ship and cargo; and such is the express meaning of Article 400 of the Code." This interpretation of the Code is undoubtedly in strict conformity to the letter, but contrary to the spirit of the law as interpreted by VALIN, PARDESSUS, BOULAY PATTY and other distinguished luminaries of the law. The employment of the word "simultaneously," as used by the court, wonderfully restricts and limits the range of the doctrine of general average, and leaves it a mere shell without much kernel.

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\* *Translation*.—"And in general, damages voluntarily suffered and expenses incurred, after deliberation and consultation with the crew, for the common benefit and safety of the ship and goods from the time of their loading and departure to their arrival and unloading, are general averages."

† See the case in note, page 38.

In contrast with these theories, the American law is based on the idea that the motive or inducement to the general average act or expenditure may be and often is, not the mere "physical safety" of the ship and cargo without regard to the successful completion of the voyage, but the ultimate advantage and benefit to ship, freight and cargo produced by the arrival of the ship and cargo together at the port of destination. The motive may be, in many instances, the immediate "safety" of the ship and cargo and the lives of the persons on board; as in cutting away a mast to right a ship in a storm, and most other cases of sacrifice. But physical safety attained there often springs up another motive, which is, the saving of the voyage—the whole adventure—which is for the common benefit of all the parties concerned. A community of interest in the voyage is recognised. Hence, excluding from general average the expenses of repairing damages caused to the ship by accident or *vis major*, which the ship-owner is himself bound to pay by his contract of affreightment, most other expenses incurred in a port of refuge; such as the expenses of unloading, storing and reloading the cargo, including the wages and provisions of the crew during the detention, are admitted in general average. The landing of the cargo from a stranded ship, with a view to re-float the ship and resume the voyage, does not interrupt, suspend or dissolve the community of interest between the ship and cargo, so long as the cargo remains under the control of the master, and is liable to be taken again on board for the purpose of prosecuting the voyage, and expenses subsequently incurred by the master in his continued endeavors to refloat the ship, with a view to the reloading of the cargo and the prosecution of the voyage, are admitted in general average.

Notwithstanding some uncertainty in the precise meaning of the language employed by the Supreme Court in its decision in the case of *McANDREWS vs. THATCHER*, yet I think this case, when interpreted by the case of *NELSON vs. BELMONT*, to which we have referred, does decide that a complete separation of the cargo from the ship by the master or owner, *not again to be returned to the ship*, dissolves the community of interest between them, whether such separation takes place at a distance from the port of destination or by a delivery by lighters at the port of destination, and that consequently all general average charges thereafter cease. Such a separation, when it takes place at a distance from the port of delivery, is equivalent to the abandonment of the voyage; and when it takes place by a delivery at the port of destination, it is equivalent to a completion of the voyage as to the cargo, which can no longer derive any benefit from the expenditure of money on account of the ship. The abandonment of the voyage is also held to dissolve the community of interest.

The objection to considering a separation of the cargo from the ship, *not again to be returned to it*, or the *abandonment* of the voyage, as the point of time when a dissolution of the community of interest takes place, is, that the standard is variable and uncertain, depending as it does upon the *intentions* of the master. It also gives the master the opportunity to delay for months in a port of refuge in order to make up his mind whether to abandon his voyage or not, and upon the abandonment and transshipment of the cargo by another vessel, to charge the expenses of the delay, including the wages and provisions of his crew, to the account of general average, when, at the same time, the cargo has derived no possible benefit, but has probably sustained a damage from such delay. In the case, too, of a stranded ship, it gives him the opportunity, and indeed

encourages him, to expend large sums of money in trying experiments to refloat the ship, knowing that, notwithstanding his failure, he will be reimbursed the expenditure in general average out of the cargo, which has derived no benefit whatever from the expenditure. It appears to me that common benefit realized, and not common benefit intended merely, is the very foundation of common average; and as the cargo derives no benefit from the delay, or from the fruitless experiments in the cases mentioned, it ought not be held to contribute to the expenses. If the delay or the experiments result in success, and a reshipment of the cargo on board and a resumption of the voyage, then the cargo does derive a benefit from the expenditures in common with the ship and freight, by being transported in the ship to its port of destination.

It appears to me it would be wiser to look more to the *fact* and less to the *intention* of the master, and to say that, the separation of the ship and cargo during the voyage, followed by a subsequent reunion, for the purpose of prosecuting the voyage, does not suspend nor dissolve the community of interest between them; but that such separation, not followed by a reunion, for the purpose of prosecuting the voyage, does dissolve such community of interest, and puts an end to any further general average charges.

It will be noticed that the York bill declares that any portion of the cargo left behind at a port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called upon to contribute to the expenses of reloading and stowing the cargo which is carried forward, nor to the expenses of the wages and provisions of the crew during the detention at the port. The reason of this rule is obvious. The portion of the cargo so left

behind is permanently separated from the ship and the other portions of the cargo, and derives no benefit whatever from the expenditure.\*

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\* When the eighth section of the York bill was under consideration by the Congress, an interesting discussion sprung up on the question of the point of time when the wages and provisions of the crew in a port of refuge should cease to be admitted in general average, *when the cargo was not carried forward in the same ship*. The bill, as originally reported, contained a proviso, "That no allowance shall be made for wages or maintenance as above, in case the ship shall be condemned at such port as irreparable or not worth repairing, or in case, for any other lawful cause, the cargo, or a substantial part of it, shall not be reloaded on board such ship for the purpose of further transport." Mr. CRUSEMANN, of Bremen, moved to strike out this proviso, and insert; "that in case the ship shall be condemned at such port as irreparable, or not worth repairing, no allowance shall be made for wages and maintenance beyond the date of condemnation."

Mr. LOWNDEN, of Liverpool, was opposed to the amendment. It appeared to him that whatever might be the case when a ship went into port to repair damages and then resume her voyage, it hardly admitted of doubt that when she went into port and was there condemned, her object for going in must have been to obtain physical safety, and that the general average, and consequently the allowance for wages and provisions, ought not to extend beyond the attainment of safety.

Mr. BAILY, of Liverpool.—The general feeling in this country as to wages and provisions is, that they should not be allowed at all on any principle, but I shall vote for their allowance when the cargo is carried forward in the ship, because ship-owners in this country feel the exclusion of them to be a great grievance; and the exclusion of them is contrary to most of the continental codes. I think, therefore, we ought to concede to that extent. The principle which excludes them, I think, is this: Everything allowed in general average should be caused by a general average act. Now, the expenditure is not caused by a general average act, but by the contracts with the crew. It is an expense incident to the general average act, but not caused by it.

Mr. BRADFORD, of Boston.—I agree with Mr. CRUSEMANN. I think wages and provisions should be allowed until there is a separation of the interest in the voyage. So long as the community of interest exists, so long are the ship, freight and cargo bound together by the contract, and just so long any loss or any expense should be general average.

Mr. BAILY.—The objection to Mr. CRUSEMANN's amendment, which allows wages and provisions up to the date of condemnation, is this: In the case of ships condemned at distant ports, captains are afraid to act. They hand the matter over to their owners, and often there ensues a long discussion between the owners and the underwriters, which involves great delay.

Mr. LOWNDEN.—I cannot see any ground for making the cargo contribute to general average for the wages and provisions of the crew, after the time when the cargo has been discharged, and it is not again reloaded for the purpose of being carried forward. From that point the cargo ceases to be interested in any way in

[Damage to Cargo in Discharging.]

“SECTION IX. Damage done to cargo by discharging  
“it at a port of refuge shall not be admissible as general  
“average, in case such cargo shall have been discharged

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the detention. The connection between the ship and cargo is at that point terminated.

MR. CRUSEMANN.—I think that wages and maintenance ought to be paid up to the same time as the storage and other expenses of the cargo. The storage and other expenses of the cargo will be charged in general average up to the time of the condemnation of the ship, and it is therefore proper that the ship-owner should be placed in as good a position as the owner of the cargo.

DR. RAHUSEN, of Amsterdam.—The views of Mr. LOWNDEN are very objectionable. According to his views, from the moment the cargo was discharged until the day of condemnation, the wages and maintenance of the crew should not fall upon general average, but upon the ship-owner, for he could not recover them from his underwriter as a particular average. That is contrary to all the principles of law I ever heard of, and will be thought to be very unjust. After the date of the condemnation of the ship you may leave it for the ship-owner alone to pay all expenses, because he then may pay off the crew, but not till then.

MR. BAILY.—If a vessel is condemned at a port of refuge, I hold that the cargo is not liable to pay any of this general average.

DR. WERTHEIM, of Amsterdam.—Mr. LOWNDEN'S view is quite contrary to the principle of law as to general average, which is, that between the ship, the cargo and the freight, the confraternity of interest ceases when the ship is condemned. Up to that time general average ought to rule. After that time nothing ought to be allowed. The only definite point of separation is the date of condemnation. Then there is the warehouse rent to be considered.

MR. BAILY.—I should not put the rent to general average. I repudiate that principle altogether.

DR. WERTHEIM.—It is said in the seventh section that when, in order to repair the damage done to the vessel, the cargo is discharged, the warehouse rent should be admitted into general average; yet now we are told by Mr. BAILY that if the ship happens to be not worth repairing, the cargo, and not the general average, ought to pay this charge. This distinction cannot be founded on any principle.

MR. ENGLER, of Antwerp.—I quite agree with Mr. BAILY. When does this confraternity between ship and cargo cease? That is the whole question. I agree with Mr. BAILY, that from the moment that the cargo is discharged, the allowance in general average ought to cease. You cannot certainly make the cargo pay the expenses of the wages and provisions of the crew until a reply can be got from the owners—a proceeding which might extend over four or five months. The captain ought to know what he is to do.

MR. CRUSEMANN.—That the confraternity ceases at the very moment the cargo is discharged, is not the right view of the case. I think that it is not so. It may

“at the place and in the manner customary at that port  
“with ships not in distress.”

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cease for a time, but it does not cease ultimately and positively until the ship is condemned. The date of condemnation can be the only time when the interests are separated.

Dr. FRANCK, of Hamburg.—As soon as the cargo is left behind in the port of refuge, for any reason, the port of refuge becomes the port of destination of the different interests, *i. e.*, of the ship, the freight and the cargo; and, as in a port of destination the charges in question are not general average, so they are not in the port of refuge.

Mr. CRUSEMANN.—Up to the time of the condemnation of the ship nobody has a right to dispose of the cargo. The shipper cannot take it away. The captain is not excused from keeping charge of it for the purpose of transit. The confraternity of interest, therefore, does not cease until after condemnation.

Mr. LOWNDES.—With regard to the argument of Mr. CRUSEMANN there is a case that constantly happens, to which it would not apply at all. As soon as the cargo is discharged, it is at once seen that the ship is so damaged that she cannot be repaired on the spot or at any place in the neighborhood, so as to convey the cargo forward. The cargo is then at once sent forward in another vessel. Then comes the question, whether or not it will be possible, by temporary repairs, to bring the ship where she can be repaired. I assume that any port at which the ship could be repaired would be so distant that the voyage would be completely at an end, and there would be no obligation to go back to fetch the cargo. Now, in this case which I have supposed—a common case—the question, whether the cargo should ever be carried forward in the ship or not, was determined at the very moment when the cargo was discharged. The subsequent fate of the ship was a matter of the most absolute indifference to the cargo. Surely in such a case as that, it would be unreasonable to make the cargo contribute to the expenses during the time that it had nothing to do with the ship. In other cases the state of the ship and the consequent impossibility of repairing may not be known until a later period. Still this impossibility *existed* from the first, and whenever it is ascertained, we should treat the matter as if known from the first. By far the largest concessions have been made to the views of foreign countries; for every English member believes the allowance of wages and provisions at all to be an erroneous course.

The provisos were ultimately all stricken out, and the bill adopted as it now reads as a compromise, the English delegates having yielded the great points of admitting in general average the storage and reloading the cargo in a port of refuge, and the wages and provisions of the crew during the detention, *when the ship shall have sailed thence with her cargo*. “When a ship,” says M. CAUVET, “is condemned in a port of refuge, as incapable or unworthy of repairs, expenses are incurred for keeping and selling the ship, and for unloading, storing and reloading the cargo upon another vessel. These expenses are not general average, but are at the charge of each proprietor of the thing which necessitates them.”



In practice, this damage is not allowed in general average by the English adjusters, but is by the American. Loss either by diminution in quantity or deterioration in quality, caused directly by the handling of the cargo in unloading, storing and reloading, and which cannot be attributed to the *vice propre* or nature of the article itself, is, in practice, allowed in general average in the United States.\*

"Our custom, sanctioned by a decision of the Tribunal of Commerce of Marseilles," says M. CAUVET, "is to reduce the deficiency in quantity to be allowed to the mean proportion which the same kind of merchandise ordinarily suffers in landing, when there has been no circumstance to aggravate it. For the cereals and grains, this loss is estimated at two per cent. of the quantity loaded on board. Coopering and rebaling packages are allowed."†

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[Contributory Values.]

"SECTION X. The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the ship-owner's freight, and passage money at risk, of two-fifths of such freight, in lieu of crew's wages, port charges, and all other deductions; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the arising of the claim to general average.

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\* 1 Wallace, C. C. R. 355.

† § 372.

"SECTION XI. In every case in which a sacrifice of  
 "cargo is made good as general average, the loss of  
 "freight, if any, which is caused by such loss of cargo,  
 "shall likewise be so made good."

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The principle of a limitation of the liability of the ship-owner to the value of the ship and freight for the acts and contracts of the master, is incorporated into the system of commercial law of France, Belgium, Holland, the German States, and probably every country on the continent of Europe. The abandonment of the ship and freight to the creditor discharges the ship-owner from any further liability on account of the misconduct or engagements of the master. The principle is grounded on the maxim, that property on shore ought not to be endangered by adventures at sea.\* The liability of the underwriter is, in like manner, correspondingly limited to the payment of the sum insured.†

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\* *French Code*, 216. *Holland*, 321. *German*, 452.

† M. CAUVET, 181, says: "The sum assured is the limit of all the obligations contracted by the insurer, when they are not enhanced by some personal act. Policies very frequently contain a clause to that effect; but, independently of any such clause, it is sufficient that the insurer has subscribed on account of a fixed sum, and he cannot be constituted a debtor beyond that sum in the course of the assurance." A copy of the policies in common use in Paris, given to me by a leading insurance company, contains the clause: "The sum subscribed by each insurer is the limit of his engagement; he can never be held to pay beyond that sum." The policies of the insurers in Bordeaux, Marseilles and Cadiz contain the same clause. *Guide Général des Assurances Maritimes*, par GABRIEL LAFOND DE LURCY. English and American underwriters may be liable on policies, in common use among them, on a single voyage, for a general average contribution and a particular average for repairs, and, after these, for the total loss of the ship. Thus, claims to the extent of 150 per cent. may be aggregated on a policy. *Hopkins' Hand-Book of Averages*, page 301.

The personal liability of the owners of a vessel for the acts of the master, as such, is regulated by the law of the place where the owner resides, and to which the vessel belongs. *POPE vs. NICKERSON*, 3 *Story*, 479. It concerns, therefore, our

Not so, according to the English and American law. By these, if the master borrows money on the credit of the owner in a foreign port, to make the necessary repairs to

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merchants to know, that when they ship their goods on board of a French, German, Hamburg or Bremen ship, and they are sold or hypothecated by the master for the necessities of the ship, or are held liable to contribute on account of the sale of a co-shipper's goods for the same purpose, they have no remedy over against the ship-owner that he cannot bar by abandoning the ship and freight, though both may be greatly diminished in value, or totally lost. The personal liability of English and American ship-owners for the acts of the master is also limited by statute in certain specified cases, but that of the master's borrowing money in a foreign port for the necessities of the ship, is not one of them; and if the master sells the shipper's goods, or hypothecates them for such purpose, and they are sold to satisfy the bottomry, the ship-owner is personally liable for their value at the port of destination, on the arrival of the ship, and he cannot acquit himself of the liability by abandoning the ship and freight. It is a personal debt. *BENSON vs. CHAPMAN*, 5 C. B., 330. *BENSON vs. DUNCAN*, 2 Ex. Ch., 644. *POPE vs. NICKERSON*, 1 Story, 479.

Policies of insurance in ordinary use in England and the United States do not cover a loss resulting from a sale of the goods insured to defray the expenses of the necessary repairs of the ship in a port of refuge. Such sale is not considered to be a peril of the sea. *POWELL vs. GUDGEON*, 5 Maule & Selwyn, 431. *SARGUAY vs. HOBSON*, 4 Bing., 131. *MOSES vs. SUN MUTUAL INSURANCE COMPANY*, 1 Duer, 159. *HASSAN vs. ST. LOUIS PERPETUAL INSURANCE COMPANY*, 7 La. Ann. R. 11. In France, such sale is held to be a peril of the sea, and the underwriter is held liable. *Rogron*, Art. 234.

But, to show the operation of the French and German law in the case referred to, the French Code de Commerce, articles 216 and 298, as amended June 14, 1841, reads: "Every ship-owner is civilly responsible for the acts of the master, and bound by the engagements contracted by him for whatever relates to the ship and the voyage. He can, in every case, free himself from these obligations by abandoning the ship and freight. When, from the exercise of this right, there results a loss to those whose goods have been sold or hypothecated, it shall be divided proportionally upon the value of such goods, and the value of those which have arrived at their destination, or which have been saved from shipwreck subsequently to the events of the sea which necessitated the sale or hypothecation." The new German Code declares that, "if the master shall have given a bottomry bond on the cargo, or have disposed of the same by sale, or otherwise, in order to be able to continue the voyage, although for an expense which does not belong to general average, then the loss which the party interested in the cargo may sustain, because his claim cannot be satisfied, or can only partly be satisfied by ship and freight, shall be borne by the whole of the parties interested in the cargo, according to the regulations laid down for cases of general average."

Thus the policy of limited liabilities, on account of sea adventures, is fully and consistently carried out in these countries. The ship and freight failing, the cargo pays all expenses, even the repairs of the ship caused by accidental sea damage.

the ship, or to pay general average expenses, the owner is bound to pay the debt, and the shippers are bound to contribute their proportion of the general average expenses, whether the vessel and cargo subsequently arrive at the port of delivery or are totally lost. Hence, the ship-owner may suffer a total loss of his ship and the shipper of his goods; and, in addition thereto, the expenses which have been antecedently incurred, whether particular or general, and the underwriter's liability may, in like manner, be correspondingly extended beyond the sum insured.\*

One consequence of a limitation of the liability of the ship-owner to the value of the ship and freight has been the ignoring, in the countries where this limitation prevails, of the distinction which obtains in English and American law, in certain cases, between *sacrifices* and *expenditures*, in fixing the contributory values in the adjustment of general averages. In those countries, whether the general average consists of sacrifices to be made good, or expenses to be reimbursed, the contributory values are the same, and are the values *saved* at the termination of the adventure. In both cases, if there is no salvage, there is no contribution.† The section of the bill under consideration, in like manner ignores the distinction between sacrifices and expenditures, and in both cases adopts the value *saved* at the *termination* of the *adventure* as the contributory values; so that, if there is nothing saved, there is no contribution.

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\* 7 *John.*, 413. 9 *Mass.*, 548. 14 *Ib.*, 66. 2 *Phillips*, § 1874. 2 *Arnould*, 344. 5 *C. B.*, 330.

† When the ship is condemned and sold in a port of refuge and the cargo transhipped, the cargo contributes according to its value at the port of its destination, and the ship according to proceeds received. What is finally saved is what contributes. *Cauvet*, § 418.

In adjusting losses arising out of *sacrifices*, English and American law adopts the value saved at the termination of the adventure as the contributory values, so that, as to these, if there is nothing saved, there is no contribution. But in adjusting losses arising from *expenditures*, not secured by bottomry or respondentia, the value of the property at the time the expenses are incurred, is taken as the true contributory value, and contribution may be exacted in this case, though nothing is ultimately saved.\*

If the bill should become a law, the result would be, that the master would borrow money to pay general average expenses by hypothecating the ship, freight and cargo, instead of drawing a bill on the owner, or, if the ship-owner advanced the money, he would protect himself by insurance.

According to English, Scotch, Danish, German, Spanish and American law, the contributory values of ship, freight and cargo are the totalities of their respective net values.†

The value of the ship for contribution is the amount that the hull, masts, yards, rigging and stores are really worth after the sacrifice is made, with the addition of the amount made good by the general average contribution.

The contributory value of the freight is the net freight saved. To arrive at the *net* freight, the practice in England is, to deduct from the gross freight the ordinary port charges incurred on the vessel in the course of the voyage; after the liability for the general average attaches to freight, the amount paid by the ship-owner for wages of the crew during the voyage on which *that* freight is

\* 2 *Phillips*, § 1874. 2 *Arnould*, §§ 344-349. 9 *Mass. R.*, 548. *Phillips' Benecke*, 241.

† *Dutch Code*, 727. *German Code*, 719. *Spanish*, 954-5-6.

earned, and the charges for delivering the cargo at the port of destination.\*

In the United States a practice has very generally obtained of deducting a certain proportion from the gross freight as an equivalent for the crew's wages, port charges, &c., as in the York bill. The common practice in New-York, Virginia, Georgia, Texas and California, is to deduct from the gross freight one-half; in Massachusetts, Maine, Maryland, Louisiana and Pennsylvania one-third.†

The contributory value of the cargo is its actual value, stripped of all the charges attached to it, such as freight, duty and landing charges.‡

In France, Portugal and Belgium, the ship and freight contribute for one-half their respective values, and the cargo for the whole.§ If the ship has been repaired subsequent to the accruing of the general average, it is its half value in its antecedent condition of damage which is taken in practice as the basis of contribution. The favor which the law shows to the ship-owner in requiring him to contribute on the half value only of the ship and freight, while the cargo owner is compelled to contribute on its total value, has the effect, says M. CAUVET, "to encourage captains to multiply sacrifices of the rigging of the ship, foreign captains taking advantage of the law as readily as the French. They procure new rigging in our ports at the expense of French consignees and their underwriters."¶ "It is an abuse," says M. DE COURCY, "notoriously of frequent occurrence. The law violates justice and promotes bad morals."

\* *Bailey*, 156.

† *Dixon*, 148.

‡ § 722.

§ *Code*, Art. 401, 417.

¶ *Cauvet*, § 426.

In Portugal coined money contributes for no more than half of its nominal value.

In all the systems there is added to the contributory values of the property contributed for, the amount made good in contribution. And in fixing the amount to be contributed to the ship-owner for sacrifices of any part of his ship, or for other general average damage, a deduction of one-third, new for old, from the labor and materials of the repairs, as well as the net proceeds of the old materials, is directed to be made by the laws of England, France, Germany, Denmark, and probably all other European countries, except in some countries, when the ship is new or on her first voyage, one-sixth is generally deducted from chain cables and nothing from anchors.\*

\* 2 *Arnould*, 996. *German Code*, § 712.

The practice of deducting one-third as a fixed sum, in adjusting general as well as particular averages from the cost of new articles which take the place of old ones in repairing a ship, as a proper equivalent for its melioration, prevails in different countries, with few or more exceptions as to particular items. In England the rule is to deduct one-third from the cost of the new articles, with the exception of copper or yellow metal sheathing, which is treated in a way peculiar to itself, and except, also, from the cost of anchors, from which nothing is deducted, and except, also, chain cables, from which one-sixth is deducted, and except, also, articles called into use for the *first time* by a general average act; as a *new* hawser, which in such case is allowed in full. One-third is also deducted from the cost of the labor employed in repairing the ship; but not from graving-dock dues, use of caulking stages, cartage and labor and boat hire in taking a vessel into and out of the dock. If the vessel was a new vessel, *i. e.*, on her first voyage, when the injury occurred, no deduction is made. *Bailey's Perils of the Sea*, 91-98. *Hopkins' General Average*, 106.

The general custom in the United States is, to deduct one-third from the cost of labor and materials employed in repairing the ship, including chain cables, whether the ship be new or old, but no deduction is made from the cost of anchors. In practice, this deduction is often made from the incidental expenses incurred in making the repairs, such as towing the vessel to the dock where the vessel is to be repaired, dock dues, hire of staging, &c.; but in *POTTER vs. THE OCEAN INS. CO.*, 3 *Sumner*, 45, Justice STORY decided that the deduction was to be made *only* from the *labor and materials* employed in the repairs, and not from the new articles purchased in lieu of those which were lost or destroyed, and not from incidental expenses incurred in making the repairs, which do not in any way enhance the value of the ship; as,

The general maritime law makes it the duty of the master to cause an adjustment of the general averages to be made, and the contributions to be collected from those who are to pay, and paid to those who are to receive, and he, the ship-owner, and the ship are responsible to the parties interested for the fulfillment of this duty.\*

Underwriters never contribute directly to general average losses; they are only bound to reimburse the assured their proportionate or ratable amount of his contribution. The extent of the liability of the underwriter depends upon his agreement contained in the

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the expense of towing the vessel to and from the dock where the repairs were made. This decision is in conformity, as we have just seen, with the English custom. Whatever may be the law on the subject in adjusting a general average as between the ship-owner and cargo owner, the policies of insurance on ships in ordinary use in Boston, require a deduction of one-third from the *labor* and *materials*; in New-York, Philadelphia and probably most other ports in the United States, they provide, that in case of a claim for loss or damage a deducting of one-third from the *cost of repairing* the ship shall be made, after deducting the value of the old materials. The terms *cost of repairing* seem to be comprehensive enough to include the incidental expenses of towing the vessel to the place of repairs, the dockage, use of stages, cartage, &c. Copper or yellow metal sheathing is treated in the United States as in England, by its own peculiar rule.

By the new German Code,† if, at the time of the casualty, the vessel has not been afloat a year, the whole amount of repairs are to be allowed; and if the separate parts of the ship or its appurtenances to be made good have not been in use a year, the whole amount is to be allowed. In other cases, a deduction of one-third is made from the whole amount of the cost of repairs, except from chain cables, from which one-sixth is to be deducted, and nothing from anchors.

According to M. FRIENET, § 637, and M. CAUVET, § 387, one-third is, by the law or custom in France, to be deducted from the value of such new articles or materials only as are liable to be impaired by use or age, and not from anchors, chains, masts, spars, and whatever is in metal; and nothing is to be deducted from the *labor* in making repairs, nor from the repairs of a new ship just off the stocks.

The Paris, Havre and Marseilles policies of insurance in ordinary use stipulate, however, for a deduction, in all cases, of one-third from the *cost of repairs*, and of all new articles except anchors, from which no deduction is to be made, and chain cables, from which fifteen per cent. is to be made, and also for one-third of the cost of the *labor* in making the repairs.

\* DUPONT vs. NEMOURS, 19 How. 163. *Le Normandie*; *Court of Cassation, Journal du Palais*, Vol. 71, Astor Library.

† § 711-12.



policy, and the law interpreting it. According to the law and the policies in ordinary use at the present day, underwriters pay general averages as follows: In London, Liverpool and other towns in England, and in Calcutta, in Boston, New-York, New-Orleans, and other towns in the United States, they pay the totality of the loss, however small it may be; in Antwerp, Amsterdam, Rotterdam, Hamburg, Bremen and Lubec they pay the totality, if it amounts to three per cent. of the sum insured; in Bordeaux, the excess of one per cent.; in Paris, Rouen and Havre, the excess of one per cent. in any long voyages, and the excess of two per cent. in coasting voyages; in Marseilles, the excess of one per cent. upon gold and silver, and the excess of three per cent. upon all other merchandise; in Nantes, the excess of three per cent., reduced to one, when there are particular averages also; in Trieste, the excess of three per cent., of five and fifteen, according to the objects insured and the voyage; in Geneva and Livourne, the excess of three per cent.\*

Having now presented to the consideration of the Chamber and Board the draft bill, recommended by the Congress at York to be adopted by the legislatures of the several nations of the commercial world, and stated, briefly, but, I believe, with considerable accuracy, the law and practice which, at the present time, prevail in the adjustment of general averages in our own and in several foreign countries, my task is done. By comparing the modes of adjustment in different countries, as I have given them, the agreements and disagreements will be readily perceived without being specially pointed out; and their importance or want of importance as readily recognised.

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\* *Guide Général des Assurances Maritimes et Fluviales.* Par GABRIEL LAFOND DE LUBOY, 405.

Much more interest is felt upon the subject among commercial men in foreign countries than in our own, perhaps for the reason that some of their usages or laws are realized by them to be unequal and unjust. They are the more ready, therefore, to make concessions in their systems, and to labor for a general agreement of the maritime law of the world.

Soon after the adjournment of the Congress, the Belgian delegates made a report to their Government, recommending it to enact the York bill into a law. The Ship-owners' Association of Liverpool has opened a correspondence with the President of the Board of Trade and other high officers of the Government, with a view to induce the Government to lay the bill before the British Parliament and to recommend its passage.

The adoption by the Congress of the United States of the York bill would make but few changes in our own laws, and these comparatively unimportant. If, therefore, it should become the law of Great Britain, or is likely to, it may become expedient for the Chamber and Board to take into consideration the propriety of recommending the Congress of the United States to adopt it. Congress might pass the bill with a provision in it that it should take effect only upon the event of its being passed by the British Parliament, or by the Senate and Chamber of Deputies of France. If passed by those and our own Congress, it would soon become the law of the other countries of the commercial world.

All of which is respectfully submitted.

WILLIAM MARVIN.



# APPENDIX.

## CODE DE COMMERCE DE FRANCE.

## TITRE XI.

*Des Avaries.*

Art. 397. Toutes dépenses extraordinaires faites pour le navire et les marchandises, conjointement ou séparément,

Tout dommage qui arrive aux navires et aux marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement,

Sont réputés avaries.

Art. 398. A défaut de conventions spéciales entre toutes les parties, les avaries sont réglées conformément aux dispositions ci-après.

Art. 399. Les avaries sont de deux classes, avaries grosses ou communes, et avaries simple ou particulières.

Art. 400. Sont avaries communes :

1° Les choses données par composition et à titre de rachat du navire et des marchandises.

2° Celles qui sont jetées à la mer.

3° Les câbles ou mâts rompus ou coupés.

4° Les ancres et autres effets abandonnés pour le salut commun.

5° Les dommages occasionnés par le jet aux marchandises restées dans le navire.

6° Les pansement et nourriture des matelots blessés en défendant le navire, les loyers et nourriture des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations des dommages volontairement soufferts pour le salut commun, si le navire est affrété au mois.

7° Les frais du déchargement pour alléger le navire et entrer

## COMMERCIAL CODE OF FRANCE.

TRANSLATED BY JOHN RODMAN.

## TITLE XI.

*Of Average.*

Art. 397. All extraordinary expenses incurred for the ship and the cargo, conjointly, or separately,

All damage happening to the vessel or goods, from the time of their lading and departure, until their arrival and discharge,  
Are reputed average losses.

Art. 398. In default of special agreements between the parties, average contributions are regulated conformably to the provisions hereafter mentioned.

Art. 399. Averages are of two kinds, gross, or general average, and simple, or particular average.

Art. 400. The following are general averages :

1st. Things given by composition for the ransom of the vessel and cargo.

2d. Things which are thrown overboard.

3d. Cables or masts broken, or cut away.

4th. Anchors and other articles abandoned for the common safety.

5th. Damage occasioned by jettison to the goods remaining in the vessel.

6th. Medical treatment and maintenance of the seamen wounded in defending the vessel, the wages and maintenance of the seamen during the detention, when the vessel is arrested on the voyage by order of a sovereign power, and during the reparations of the damages necessarily sustained for the common safety, if the vessel be freighted by the month.

7th. The expenses of unlading to lighten the ship, in order to

dans un havre ou dans une rivière, quand le navire est contraint de la faire par tempête ou par la poursuite de l'ennemi.

8° Les frais faits pour remettre à flot le navire échoué dans l'intention d'éviter la perte totale ou la prise.

Et en général, les dommages soufferts volontairement et les dépenses faites d'après délibérations motivées pour le bien et salut commun du navire et des marchandises depuis leur chargement et départ jusqu'à leur retour et déchargement.

Art. 401. Les avaries communes sont supportées par les marchandises et par la moitié du navire et du fret, au marc le franc de la valeur.

Art. 402. Le prix des marchandises est établi par leur valeur au lieu du déchargement.

Art. 403. Sont avaries particulières :

1° Le dommage arrivé aux marchandises par leur vice propre, par tempête, prise, naufrage ou échouement.

2° Les frais faits pour les sauver.

3° La perte des câbles, ancres, voiles, mâts, cordages, causée par tempête ou autre accident de mer.

Les dépenses résultant de toutes relâches occasionnées soit par la perte fortuite de ces objets, soit par le besoin d'aviuaillement, soit par voie d'eau à réparer.

4° La nourriture et le loyer des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affrété au voyage.

5° La nourriture et le loyer des matelots pendant la quarantaine, que le navire soit loué au voyage ou au mois.

Et en général les dépenses faites et le dommage souffert pour le navire seul, ou pour les marchandises seules, depuis leur chargement et départ jusqu'à leur retour et déchargement.

Art. 404. Les avaries particulières sont supportées et payées par le propriétaire de la chose qui a essuyé le dommage ou occasionné la dépense.

facilitate her entrance into a harbor or river, when the vessel is forced to seek shelter by stress of weather or the pursuit of an enemy.

8th. The expenses incurred in getting off a vessel stranded, with the intention of avoiding a total loss or capture.

And, in general, the damages voluntarily suffered, and the expenses incurred, in consequence of deliberations taken for the security and common safety of the vessel and goods, from the time of their lading and departure until their arrival and discharge.

Art. 401. General average is borne by the goods on board, and by one-half the value of the vessel and freight, ratably, according to their respective values.

Art. 402. The price of the goods is established by their value at the place of discharge.

Art. 403. The following are particular averages :

1st. The damage happening to goods by their internal defect, by stress of weather, seizure, shipwreck, or stranding.

2d. The expenses incurred in saving them.

3d. The loss of cables, anchors, sails, masts, cordage, caused by storms or other accidents of the sea.

The expenses resulting from any detention in the course of the voyage, whether occasioned by the accidental loss of the aforesaid articles, by the want of provisions, or by the necessity of stopping a leak.

4th. The maintenance and wages of the crew during the detention, when the vessel is arrested on the voyage by order of a sovereign power, and during the reparations necessary to be made, if the vessel be freighted by the voyage.

5th. The maintenance and wages of the seamen during quarantine, whether the vessel be freighted by the month, or the voyage.

And, in general, the expenses incurred, and the damage sustained by the vessel only, or by the cargo solely, from the time of the lading and departure, until the arrival and discharge.

Art. 404. Particular averages are borne and paid by the owner of the thing which has sustained the damage, or occasioned the expense.



Art. 405. Les dommages arrivés aux marchandises faute par le capitaine d'avoir bien fermé les écoutilles, amarré le navire, fourni de bons guindages, et par tous autres accidents provenant de la négligence du capitaine ou de l'équipage, sont également des avaries particulières supportées par le propriétaire des marchandises, mais pour lesquelles il a son recours contre le capitaine, le navire, et le fret.

Art. 406. Les lamanages, touages, pilotages, pour entrer dans les havres ou rivières, ou pour en sortir, les droits de congés, visites, rapports, tonnes, balises, ancrages, et autres droits de navigation, ne sont point avaries, mais ils sont de simples frais à la charge du navire.

Art. 407. En cas d'abordage de navire, si l'évènement a été pure ent fortuit, le dommage est supporté, sans répétition, par celui des navires qui l'a éprouvé.

Si l'abordage a été fait par la faute de l'un des capitaines, le dommage est payé par celui qui l'a causé.

S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égale portion, par les navires qui l'ont fait et souffert.

Dans ces deux derniers cas, l'estimation du dommage est faite par experts.

Art. 408. Une demande pour avaries n'est point recevable si l'avarie commune n'excède pas un pour cent de la valeur cumulée du navire et des marchandises, et si l'avarie particulière n'excède pas aussi un pour cent de la valeur de la chose endommagée.

Art. 409. La clause *franc d'avaries* affranchit les assureurs de toutes avaries, soit communes, soit particulières, excepté dans les cas qui donnent ouverturé au délaissement; et, dans ces cas, les assurés ont l'option entre le délaissement et l'exercice d'action d'avarie.

Art. 405. The damage happening to goods by the fault of the captain, in not having well fastened the hatches, lashed the ship, or provided good hoisting tackle, and by every other accident proceeding from the negligence of the master or the crew, are also particular averages, to be borne by the owners of the goods, but for which they have a remedy against the master, the ship, and the freight.

Art. 406. Load-manage, towage, and pilotage, in entering and going out of harbors and rivers, duties of clearance, search, reports, tonnage, beaconage, anchorage, and other duties on navigation, are not averages, but merely expenses at the charge of the vessel.

Art. 407. In case of running foul, if the occurrence was purely accidental, the damage is borne, without remedy by the suffering vessel.

If the running foul proceeded from the fault of one of the captains, the damage is paid by the one who occasioned it.

If there be a doubt which of the two vessels was in fault in running foul, the damage is to be repaired at their common expense, in equal portions between them.

In these two last cases, the estimation of the damage is made by referees.

Art. 408. A demand of average loss is not admissible, if the general average do not exceed one per cent. of the total value of the ship and cargo, and if the particular average do not also exceed one per cent. of the value of the article damaged.

Art. 409. The clause in a policy of insurance "*free from average*," exempts the insurers from all average loss, whether general or particular, except in cases which authorize an abandonment; and, in such instances, the insured have the option between the abandonment and the claim for average loss.

## TITRE XII.

*Du Jet et de la Contribution.*

Art. 410. Si, par tempête ou par la chasse de l'ennemi, le capitaine se croit obligé, pour le salut du navire, de jeter en mer une partie de son chargement, de couper ses mâts, ou d'abandonner ses ancres, il prend l'avis des intéressés au chargement qui se trouvent dans le vaisseau, et des principaux de l'équipage.

S'il y a diversité d'avis, celui du capitaine et des principaux de l'équipage est suivi.

Art. 411. Les choses les moins nécessaires, les plus pesantes et de moindre prix, sont jetées les premières, et ensuite les marchandises du premier pont au choix du capitaine, et par l'avis des principaux de l'équipage.

Art. 412. Le capitaine est tenu de rédiger par écrit la délibération, aussitôt qu'il en a les moyens.

La délibération exprime,

Les motifs qui ont déterminé le jet.

Les objets jetés ou endommagés.

Elle présente la signature des délibérants, ou les motifs de leur refus de signer.

Elle est transcrite sur le registre.

Art. 413. Au premier port où le navire abordera, le capitaine est tenu, dans les vingt-quatre heures de son arrivée, d'affirmer les faits contenus dans la délibération transcrite sur le registre.

Art. 414. L'état des pertes et dommages est fait dans le lieu du déchargement du navire, à la diligence du capitaine et par experts.

Les experts sont nommés par le tribunal de commerce, si le déchargement se fait dans un port français.

Dans les lieux où il n'y a pas de tribunal de commerce, les experts sont nommés par le juge de paix.

Ils sont nommés par le consul de France, et, à son défaut, par le magistrat du lieu, si la décharge se fait dans un port étranger.

TITLE XII.

*Of Jettison and Contribution.*

Art. 410. If, by stress of weather, or by the chasing of the enemy, the master thinks himself obliged, for the safety of the vessel, to throw overboard a part of his cargo, to cut away his masts, or abandon his anchors, he takes the advice of the persons interested in the cargo who may be on board the vessel, and of the principal men of the crew.

If there be a difference of opinion, that of the master and the principal men of the crew shall prevail.

Art. 411. Things the least necessary, the most weighty, and of least value, are to be thrown overboard first, and afterwards, the goods between decks, at the choice of the captain, and by the advice of the principal persons of the crew.

Art. 412. The captain is required, as soon as it is in his power, to commit to writing the consultation which took place.

The consultation expresses,

The motives which have determined the jettison.

The articles thrown overboard, or damaged.

It contains the signature of the persons who assisted in the consultation, or the motives of their refusal to sign.

It is transcribed on the ship's journal.

Art. 413. At the first port at which the vessel shall arrive, the master is required, within twenty-four hours after his arrival, to depose to the facts contained in the consultation, transcribed on the journal.

Art. 414. The statement of the losses and damages is made out in the place of the discharge of the vessel, at the instance of the master, by referees.

The referees are appointed by the tribunal of commerce, if the discharge be made in a French port.

In places where there is no tribunal of commerce, the referees are appointed by the justice of the peace.

If the vessel be discharged in a foreign port, they are appointed by the French consul, and where there is no French consul, by the magistrate of the place.

Les experts prêtent serment avant d'opérer.

Art. 415. Les marchandises jetées sont estimées suivant le prix courant du lieu du déchargement ; leur qualité est constatée par la production des connaissements, et des factures s'il y en a.

Art. 416. Les experts nommés en vertu de l'article 414. font la répartition des pertes et dommages.

La répartition est rendue exécutoire par l'homologation du tribunal.

Dans les ports étrangers, la répartition est rendue exécutoire par le consul de France, ou, à son défaut, par tout tribunal compétent sur les lieux.

Art. 417. La répartition pour le paiement des pertes et dommages est faite sur les effets jetés et sauvés, et sur moitié du navire et du fret, à proportion de leur valeur au lieu du déchargement.

Art. 418. Si la qualité des marchandises a été déguisée par le connaissement, et qu'elles se trouvent d'une plus grande valeur, elles contribuent sur le pied de leur estimation, si elles sont sauvées.

Elles sont payées d'après la qualité désignée par le connaissement, si elles sont perdues.

Si les marchandises déclarées sont d'une qualité inférieure à celle qui est indiquée par le connaissement, elles contribuent d'après la qualité indiquée par le connaissement, si elles sont sauvées.

Elles sont payées sur le pied de leur valeur, si elles sont jetées ou endommagées.

Art. 419. Les munitions de guerre et de bouche, et les hardes des gens de l'équipage ne contribuent point au jet ; la valeur de celles qui auront été jetées sera payée par contribution sur tous les autres effets.

Art. 420. Les effets dont il n'y a pas de connaissement ou déclaration du capitaine, ne sont pas payés s'ils sont jetés ; ils contribuent s'ils sont sauvés.

Art. 421. Les effets chargés sur le tillac du navire contribuent s'ils sont sauvés.

S'ils sont jetés ou endommagés par le jet, le propriétaire n'est

The referees are to be sworn before they enter upon their business.

Art. 415. The goods thrown overboard are appraised, according to the price current of the place of discharge; their quality is ascertained by the production of the bills of lading and invoices, if there be any.

Art. 416. The referees appointed in virtue of Article 414, apportion the contribution for the losses and damages.

This contribution is rendered obligatory by the confirmation of the tribunal.

In foreign ports the contribution is rendered obligatory by the French consul, or where there is no French consul, by any competent tribunal in the place.

Art. 417. The contribution for the payment of the losses and damages, is made on the goods cast away, and on those saved, and on one-half the value of the vessel and freight, in proportion to their value respectively at the port of delivery.

Art. 418. If the quality of the goods has been misrepresented in the bill of lading, and they should be found of greater value, they contribute at the rate of their real valuation, if saved.

They are to be paid for according to the quality mentioned in the bill of lading, if lost.

If the goods in question be of an inferior quality to that which is indicated by the bill of lading, they contribute according to the quality therein mentioned, if saved.

They are to be paid for according to their real value, if thrown overboard or damaged.

Art. 419. Ammunitions and provisions, and the clothes of ship's company do not contribute to the loss by jettison; the value of those thrown overboard shall be paid for by contribution on all the other property.

Art. 420. The goods for which there is no bill of lading or declaration of the captain, are not to be paid for, if thrown overboard; they shall contribute if saved.

Art. 421. The effects laden on the deck of the vessel contribute, if saved.

If they be thrown overboard or damaged by the jettison, the

point admis à former une demande en contribution ; il ne peut exercer son recours que contre le capitaine.

Art. 422. Il n'y a lieu à contribution pour raison du dommage arrivé au navire, que dans le cas où le dommage a été fait pour faciliter le jet.

Art. 423. Si le jet ne sauve le navire, il n'y a lieu à aucune contribution.

Les marchandises sauvées ne sont point tenues du paiement ni du dédommagement de celles qui ont été jetées ou endommagées.

Art. 424. Si le jet sauve le navire, et si le navire, en continuant sa route, vient à se perdre,

Les effets sauvés contribuent au jet sur le pied de leur valeur en l'état où ils se trouvent, déduction faite des frais de sauvetage.

Art. 425. Les effets jetés ne contribuent en aucun cas au paiement des dommages arrivés depuis le jet aux marchandises sauvées.

Les marchandises ne contribuent point au paiement du navire perdu ou réduit à l'état d'innavigabilité.

Art. 426. Si, en vertu d'une délibération, le navire a été ouvert pour en extraire les marchandises, elles contribuent à la réparation du dommage causé au navire.

Art. 427. En cas de perte des marchandises mises dans des barques, pour alléger le navire entrant dans un port ou une rivière, la répartition en est faite sur le navire et son chargement en entier.

Si le navire périt avec le reste de son chargement, il n'est fait aucune répartition sur les marchandises mises dans les allèges, quoiqu'elles arrivent à bon port.

Art. 428. Dans tous les ci-dessus exprimés, le capitaine et l'équipage sont privilégiés, sur les marchandises ou le prix en provenant, pour le montant de la contribution.

Art. 429. Si, depuis la répartition, les effets jetés sont recouvrés par les propriétaires, ils sont tenus de rapporter au capitaine et aux intéressés ce qu'ils ont reçu dans la contribution, déduction faite des dommages causés par le jet et des frais de recouvrement.

owner is not admitted to make a demand of contribution; his only remedy is against the master.

Art. 422. There is no ground for contribution on account of damage suffered by the vessel, except where the damage has been done to facilitate the jettison.

Art. 423. If the jettison do not save the vessel, there is no ground for any contribution.

The goods saved, in that case, are not bound for the payment or indemnity of those which have been thrown overboard or damaged.

Art. 424. If the jettison save the vessel, and if continuing her voyage she should be afterwards lost,

The goods saved contribute to the loss by jettison, according to their value in the condition in which they are found, deducting expenses of salvage.

Art. 425. The effects thrown overboard, in no case contribute to the payment of the damages happened since the jettison to the goods saved.

The goods do not contribute to the payment of the vessel lost, or rendered unable to navigate.

Art. 426. If, in consequence of a consultation, the hatches have been opened to take out the goods, they contribute to the damage caused to the vessel.

Art. 427. In case of the loss of goods put into lighters, in order to lighten the ship in entering a port or a river, the contribution for the loss is made on the vessel and her whole cargo.

If the vessel perish with the rest of her cargo, the goods put into lighters do not contribute, although they reach the port in safety.

Art. 428. In all the cases above mentioned, the master and mariners have a lien on the goods, or their proceeds, for the amount of the contribution.

Art. 429. If, after the contribution has been made, the effects thrown overboard be recovered by the owners, they are bound to refund to the master and others interested what they have received in the contribution, deducting damages occasioned by the jettison, and the expenses of salvage.



## PARTS OF THE COMMERCIAL CODE OF HOLLAND.

TRANSLATED FROM THE ORIGINAL DUTCH BY J. WERTHEIM, LL. D., OF AMSTERDAM, FOR THE USE OF THE WRITER OF THIS REPORT.

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## THE ELEVENTH TITLE.

## ON AVERAGE.

*The First Division.—On Average in General.*

SEC. 696. All extraordinary expenses incurred on account of the vessel and the cargo, whether conjointly or separately, all damages sustained by the vessel or cargo from the commencement to the end of the risk, as stipulated in the Third Division of the Ninth Title,\* are all accounted to be averages.

SEC. 697. If not otherwise agreed by the parties, averages are adjusted according to the following regulations.

SEC. 698. There are two sorts of averages, "General Average or Common Average" and "Simple or Particular Average." The first is contributed for by the vessel, the freight and the cargo. The other is a special charge on the vessel or on the cargo, which suffered the damage or caused the expenses.

SEC. 699. General averages are :

1st. Whatever is given to the enemy or pirates for the surrender or the ransom of the vessel and the cargo. In doubtful cases it shall be considered that the ransom was for the vessel and the cargo conjointly.

2d. Whatever has been thrown overboard for the common safety or common benefit of the vessel and cargo conjointly.

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\* See Appendix, page 100.

3d. Cables, masts, sails and other shipstores cut or broken for the same purpose.

4th. Anchors, cordage and other objects slipped for the same purpose.

5th. Damage done by jettison to cargo remaining on board.

6th. Damage voluntarily caused to the hull of the vessel, in order to facilitate a jettison, or the lightening of the ship, or the saving of the cargo, or to cause the water to run off, together with the damage done to the cargo by the running off of that water.

7th. The attendance and medical assistance required for all persons wounded or maimed on board while defending the vessel, as well as the cost of maintenance and indemnity for the same.

8th. The indemnity or ransom for all persons who may be sent on the sea or on shore in the service of the vessel or of the cargo, and are taken, made and kept prisoners or slaves.

9th. The wages and provisions of the crew during the time that the vessel was compelled to remain in a port of distress.

10th. The pilot and all other harbor dues paid on the entrance into and the departure from a port of distress.

11th. The rents of warehouses and other places of deposit wherein the cargo is placed, which cannot remain on board, during the repairs, in a port of distress.

12th. The expenses of claiming the ship and cargo seized or captured, when both are claimed together by the master.

13th. The wages and provisions of the crew during the time occupied in making such claim, if the vessel and cargo are both released.

14th. The expenses of discharging, of lighterage, and other expenses incurred, in order to bring the vessel into a port or river for the common safety of the ship and cargo, when compelled by gales, by the pursuit of enemies or pirates, or by any other cause, to enter such port or river. And also the loss or damage\* sustained by the discharge and loading into lighters or boats of the ship when in distress, and the reloading on board the vessel.

15th. Damage caused to the vessel or cargo, or both, by the vessel's being voluntarily run on shore in order to avoid capture

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\* Of the cargo.

or total loss, or to save the vessel <sup>and</sup><sub>or</sub> cargo from any other imminent danger.

16th. The expenses and costs for assistance paid in order to get the vessel off, run on shore as referred to in the preceding clause, and compensation for any extraordinary services rendered with the view of preventing a total loss or capture.

17th. The loss or damage happening to the cargo which, in case of need, has been discharged into lighters or boats, including the share in the general average due by the same cargo to the lighters or boats, and reciprocally the loss or damage caused to the cargo remaining in the original ship, and to the ship itself, occurring after it has been lightened, in so far as that damage or loss can be computed for as general average.

18th. The wages and provisions of the crew, if the ship, after having commenced her voyage, be stopped by a foreign power or by the breaking out of war, so long as both ship and cargo are not released from all reciprocal liabilities.

19th. The bottomry premium on moneys taken for covering the expenses falling under general average.

20th. The premium required for insuring the expenses mentioned in the preceding clause, or the loss sustained by the sale of a part of the cargo in a port of refuge, in order to cover the aforesaid expenses.

21st. The costs of drawing up the general average adjustment.

22d. The costs, including the increased wages and provisions of the crew, caused by an extraordinary quarantine, not foreseen at the time of chartering the vessel, in so far as the ship and cargo are subjected thereto ; and,

23d. In general, all damages in a case of danger caused voluntarily, and sustained as an immediate consequence thereof, and the expenses that in similar circumstances are incurred after due consultation, for the preservation and common benefit of the ship and cargo.

SEC. 700. In case the internal defects of the ship, its unfitness to perform the voyage, or the fault or negligence of the master or crew, has caused damages or costs, such damages and costs, notwithstanding they may have been incurred voluntarily and after due consultation for the benefit of ship and cargo, shall be excluded from general average.

SEC. 701. Particular averages are :

1st. All damages and losses sustained by the ship or cargo by storms, capture, wreck or accidental stranding.

2d. Salvages and expenses caused by the act of salvage.

3d. The loss of and damage sustained by cables, anchors, cordage, sails, bowsprit, top-masts, yards, boats and ship's utensils, caused by storms or other disaster at sea.

4th. The expenses for claiming, and the provisions and wages of the crew during the period of claiming, in case only the ship or the cargo be arrested or seized.

5th. The particular repairs of packages, and the costs of preserving and restoring the damaged goods, in so far as this is not an immediate consequence of a disaster occasioning general average.

6th. The additional freight, and the expenses of loading and discharging in the case of the condemnation of the ship during the voyage in those cases in which, according to the regulations of clause 478 of this Code, the goods are forwarded by another ship for account of the shippers.

7th. In general, all damages, losses and expenses incurred, not caused or made voluntarily, and for the preservation and common benefit of ship and cargo, but sustained by or made on behalf of the ship alone or the cargo alone, and which, consequently, in conformity to clause 699, do not appertain to general average.

SEC. 702. When a ship, on account of shallows, shoals or banks, known to exist, is unable to sail with its full cargo from the place of departure or to the place of destination, and consequently a portion of the cargo has to be forwarded by lighters or discharged into lighters, such lighter dues are not regarded as average.

These expenses are for the ship's account, unless agreement be made otherwise in the bills of lading or the charter-party.

SEC. 703. The provisions of clauses 698, 699, 700 and 701 in regard to general and particular averages, are also applicable to the lighters just mentioned and the goods therein laden.

SEC. 704. If, during the passage, a damage arises either to the lighters or to the goods therein laden, which damage pertains to general average, such damage shall be placed to account, in the proportion of a third for the lighters, and two-thirds for the goods on board of the same.

These two-thirds shall be contributed for as general average by the principal ship, the freight and the whole cargo, inclusive of the cargo laden in the lighters.

SEC. 705. The goods laden in the lighters remain reciprocally connected with the principal ship and the remaining cargo, (on board,) and share in the common average which may have happened to the ship and cargo, until the time when the first mentioned shall have been discharged at the place of their destination and delivered to the consignees.

SEC. 706. Goods not yet laden on board either the principal ship or the boats destined to convey them to that ship, contribute in no case to the losses that may have occurred to the principal ship in which the same were to be laden.

SEC. 707. The damage caused to cargo from the negligence of the master in not closing the hatches, in not duly securing the ship, in not providing adequate implements for hoisting, and all other mishaps arising from the fault or carelessness of the master or of the crew, are all particular averages, a redress for which the charterer can sue the master, the ship and the freight.

SEC. 708. The pilot, towing and other dues on entering or leaving harbors or rivers, all local dues and expenses incurred by vessels in localities where they are levied, all buoy, anchor, light-house and beacon dues, as well as all other dues connected with navigation, are not averages, but ordinary expenses for the ship's account; unless some other agreement be made by bills of lading or charter-party.

These expenses are in no case chargeable to the underwriters, except in the particular case of the same being occasioned by some unforeseen and unusual circumstances occurring during the voyage.

SEC. 709. The following regulations will serve to determine the particular average which an underwriter must pay who has insured the goods against all risks:

Whatever may have been stolen, lost, or sold in consequence of damage arising from the perils of the sea, or any other cause against which they are insured, shall be estimated according to the invoice value of the same, or should that not be available, by the value at which the goods have been insured, conformably to the provisions of the law, and the underwriter shall pay that amount.

On the arrival of the insured goods, in case they should be damaged in the whole or in part, it shall be determined by surveyors what their value would have been had they been conveyed in an undamaged state, and further, what their actual value is ; and the underwriters shall pay such part of the sum insured as is in proportion to the difference between the two valuations, as well as the costs arising from making up the estimate of the damage.

All the preceding is without prejudice to the estimate of the expected profit, if the profit has been insured.

SEC. 710. In no case can the underwriter compel the assured to sell the insured property in order to determine the value thereof, unless otherwise provided by the policy.

SEC. 711. In cases where the statement of the damage has to be made up in a foreign port, the local laws or usages there prevailing shall be followed.

SEC. 712. When the insured goods arrive here damaged or diminished in quantity, and the damage is externally visible, the goods must be examined and the damage taxed by surveyors before the goods come under the control of the insured. In case the damage or decrease should not be externally visible on discharging the goods, the examination can be made after they have come under the control of the insured, provided the same shall take place within seventy-two hours after discharge, without prejudice to all that may be deemed as necessary for proof on either side.

SEC. 713. In case of damage to an insured ship, caused by perils of the sea, the underwriter shall be liable to pay only two-thirds of the amount required for repairs, whether the same have been made or not ; and this in the proportion of the insured to the uninsured part. A third shall be defrayed by the assured in consideration of the supposed improvement from substituting new material for old.

SEC. 714. If the repairs have already been made, the amount of costs shall be proved by accounts and all other means of proof, and, if necessary, by an estimate made by surveyors. In case the repairs have not been made, the amount of the same shall be estimated by surveyors.

SEC. 715. If it should appear, after consultation with surveyors, if necessary, that, in consequence of the repairs made, the

value of the ship has been augmented by more than a third, the underwriter shall pay in proportion, as provided for by Section 713, the entire amount of the costs, less the amount of the augmented value of the ship caused by such improvement.

SEC. 716. If, on the contrary, (after estimate made as before, if necessary,) the insured should prove that the repairs have in no way improved or augmented the ship's value, and especially from the ship's having suffered the damage while still new and during her first voyage, or from the damage having occurred to new sails or new ship's utensils, or to anchors, iron chain cables, or new copper sheathing, the third shall not be deducted, and the underwriters shall be liable to make good the whole amount of the repairs, in proportion as provided for by Section 713.

SEC. 717. Should the costs of repairs exceed three-fourths of the value of the ship, the ship shall be considered, in so far as concerns the underwriters, as condemned; and the underwriters shall then, if the ship has not been abandoned, pay the insured amount, deducting the value of the ship or wreck.

SEC. 718. In case the ship arrives in a port of refuge, and subsequently, from any cause, be lost, the underwriter shall not be liable to pay beyond the amount which he has insured.

The same shall be the case when a ship has expended more than the sum insured for sundry repairs.

SEC. 719. Save and except the stipulations of Sections 643, 644 and 645,\* the insurer is not bound to pay any general or particular average in case the same, excluding the costs of survey, estimating and drawing up of statement, do not amount to one per cent. of the value of the objects damaged, without prejudice to the parties concerned to make any other agreement.

SEC. 720. The underwriters, as well on the ship as on the freight and the cargo, shall pay each so much for general average as those objects, in so far as the insurance thereon is made, respectively contribute in general average, and that in the proportion of the insured to the uninsured portion.

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\* See Appendix, page 102.

SEC. 721. When the general and particular averages are adjusted, an account thereof, as well as the documents thereto relating, shall be delivered to the underwriters. The latter shall be bound to pay the amount due from them within six weeks thence ensuing, and after that period shall be liable to pay legal interest. (N. B. 6 per cent.)

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*Second Division.—On Statement of and Contribution for General Average.*

SEC. 722. The statement and apportionment of general average shall be made up where the voyage terminates, unless the parties concerned have made another agreement.

SEC. 723. In case of a voyage being broken up within this country, or of a ship being stranded therein, the statement and apportionment shall be made up at the place whence the ship, within this country, departed, or was to have departed.

SEC. 724. The statement and apportionment of general average shall be made up at the request of the captain and by experts, who shall be appointed by the interested parties, or by the district court of the place within the kingdom where the said statement and apportionment are to be made up.

The experts shall be sworn before they commence their duties.

The statement shall be ratified by the district court.

In foreign ports the general average shall be made up by the local authorities of that place.

SEC. 725. In case of a voyage being given up on the passage, or of a sale of the cargo in a port of refuge, both occurring beyond this country, the claim, statement and apportionment of the damage shall be made at the place where such voyage is given up, or where the sale takes place.

SEC. 726. In case the captain should neglect to make the statement of averages mentioned in the preceding section, the owner of the ship, as also those of the goods, shall be competent to make one statement themselves, without prejudice to their claims against the captain for indemnity.

SEC. 727. General averages shall be apportioned for contribution :



Upon the value of the ship in the condition in which she arrived in her damaged state, adding thereto what is allowed by way of indemnity for general average.

Upon the freight, deducting the wages and provisions for the crew; and

Upon the value of goods on board the ship at the time the loss occurred, or that were in the lighters or boats, or which, before the disaster, were jettisoned by necessity and reimbursed; or that had to be sold in order to meet average expenses.

Coined money shall contribute in general average according to the exchange at the place where the voyage terminates.

SEC. 728. The laden cargo shall be estimated at its value at the port of discharge, subject to a deduction for the freight, custom duties and costs of discharging, as well as of the particular average which may have happened to the same during the voyage.

This is subject to the following exceptions: When the statement or apportionment is made up at the place whence the vessel commenced its voyage in this country, or was to have commenced it, the price of the laden goods shall be fixed according to the value of the same at the time they were laden, with the costs till on board, exclusive of the insurance premium; and in case the goods may be damaged, according to their real value.

In case the voyage should be entirely given up, whilst in a foreign port, or the cargo be sold, and the average could not be made up at that place, the price that the goods were worth on the passage, or the net amount at the place of sale, shall be taken as their contributory value.

SEC. 729. The goods jettisoned shall be valued at their market price at the place where the ship is to be discharged, after deduction of the freight, custom duties and ordinary charges; the nature and condition of the same shall be determined by bills of lading, invoices and other documentary proofs.

SEC. 730. If the nature or quality of the wares were falsely stated in the bill of lading, and they have a greater value, they shall contribute on the basis of their real value if they are saved.

But should they be lost by jettison, they shall be contributed

for according to the quality they purport to have had by the bill of lading.

If the said goods were of an inferior quality to that mentioned in the bill of lading, they shall contribute on the basis of the quality stated in the bill of lading, if they were saved.

They shall be paid for on the basis of their real value in case they shall have been jettisoned.

SEC. 731. The provisions, clothing of the crew, and the usual clothing of passengers, as well as the ammunition required for defence of the ship, shall not contribute to the loss caused by jettison. The value of all things of that nature thrown overboard shall be paid for by an apportionment on all other goods.

SEC. 732. The goods for which the master has signed no bill of lading, or which do not appear on the ship's manifest, shall not be paid for if jettisoned; they shall contribute for the jettison if saved.

SEC. 733. The goods laden on the deck of the ship shall also contribute for the damage if saved.

If the master, without the knowledge or consent of the shipper, shall have placed the goods on the deck, and the same have been jettisoned, or have been injured by jettison, the shipper shall have a right to claim contribution, without prejudice to an action by the parties interested against the ship and the master.

SEC. 734. If, notwithstanding the jettison of goods or the cutting of ship's rigging, the ship should be lost, no apportionment shall take place; the goods saved or salvaged shall not be liable to any payment or contribution for damage sustained by objects jettisoned, injured or cut.

SEC. 735. If the ship shall be saved by jettison or cutting, and be lost afterwards while prosecuting her voyage, and then goods are saved, such goods shall contribute for the jettison for the value only that they may then have, salvage costs being first deducted.

SEC. 736. If ship and cargo be saved by cutting, or other damage done to the ship, but the goods subsequently perish or be stolen, the master shall have no claim on the owners, char-

terers, or consignees of such goods, to contribute for such cutting or damage.

SEC. 737. If the loss of the goods should be caused by the fault or act of the charterer or consignee, they shall be made to contribute nevertheless to the general average.

SEC. 738. The owner of a cargo is in no case liable to contribute for general average more than the value of the goods on their arrival; such expenses excepted as the master, after the ship's loss, capture or arrest, defrayed *bona fide*, even without orders to save or to reclaim some portion of the lost or captured goods, though his efforts may have proved unsuccessful.

SEC. 739. If the owners of jettisoned goods should recover them after the apportionment is made, they shall restore to the shipmaster or owners of the cargo what they may have received as indemnity by the apportionment, deducting the damage, costs and salvage.

The aforesaid restitution shall be apportioned between the ship and the parties concerned in the cargo, in the same proportion that they contributed to the damage caused by jettison.

SEC. 740. The owners recovering jettisoned goods, and not claiming any indemnity, shall in no case be liable to contribute for any damage done to the other goods after the jettison.

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## APPENDIX I.

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### CHAPTER III.

#### FROM THE COMMENCEMENT TO THE TERMINATION OF RISK.

SEC. 624. When a ship is insured, the underwriter's risk commences from the moment the captain has begun to take in his cargo; or, in case he should be sailing in ballast, as soon as he has begun to take in the ballast.

SEC. 625. The risk of the insurance contracted by the underwriter in virtue of the preceding section, shall terminate 21 days after the insured ship shall have reached her destination, or so much sooner as the last portion of the cargo or goods shall have been discharged.

SEC. 626. In case a ship shall be insured for the voyage out and home, or for more than one voyage, the risk continues without interruption to the 21st day, inclusive, after the last voyage has been completed, or so many days less as the last portion of the cargo or goods shall have been discharged.

SEC. 627. When once an insurance on goods shall have been effected, the underwriter's risk shall begin as soon as the goods have been brought to the wharf or the quay in order to be conveyed thence to the ship in which they are to be laden, and shall end 15 days after the ship shall have reached its port of destination, or so much sooner as the insured goods shall have been discharged and deposited on the quay or wharf.

SEC. 628. When an insurance shall have been effected on goods or cargo, the risk shall continue uninterruptedly, notwithstanding the captain may be obliged to make for a port of refuge and there discharge and repair, until the voyage shall be legally stopped, or the insured shall have ordered the goods or cargo not to be reshipped, or the whole voyage shall have been accomplished.

SEC. 629. If the captain or the insured should be prevented by legal causes from discharging within the period prescribed by Section 627, without rendering himself liable to a charge of willful delay, the underwriter's risk shall continue until the goods shall have been discharged.

SEC. 630. In case an insurance has been effected on the freight to be earned, the underwriter's risk shall begin from the moment the goods chargeable with freight shall have been laden in the ship, and so in proportion to the quantity so laden, and shall end 15 days after the ship shall have reached the agreed port of discharge, or so much sooner as the goods or cargo chargeable with freight shall have been discharged.

The provisions of Section 629 are also applicable to this.

SEC. 631. In an insurance on bottomry the underwriter's risk shall begin and end at the same time when the risk of the lender on bottomry legally begins and ends, or according to an agreement communicated to the underwriter.

SEC. 632. When a voyage shall have been stopped after an underwriter's risk has begun, an insurance on goods shall run 15

days, and on a ship twenty-one days, after the stoppage of the voyage shall have occurred, or so much shorter time as the discharge of the last portion of the goods or cargo shall have been effected in.

SEC. 633. The time of the commencement and termination of the risk on expected profits shall be the same as the time fixed for the goods.

SEC. 634. In an insurance the respective parties shall be at liberty to make such other terms and provisions, with respect to the commencement and termination of the precise period of risk, as they may think proper.

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## APPENDIX II.

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### CHAPTER IV.

#### ON THE RIGHTS AND OBLIGATIONS OF THE UNDERWRITER AND INSURED.

SEC. 643. In case of insurance on liquids, as wine, brandy, oil, honey, pitch, tar, molasses, or such like articles, and on salt or sugar, the underwriter is not liable to indemnity for any damage caused by leakage or liquefaction, if not a consequence of the ship's striking, wrecking or stranding, or of discharging and reshipping the insured goods in a port of refuge.

If the causes, or one of them, exist, which render or renders the underwriter liable to pay the damage done by leakage or liquefaction, from the amount of that damage is to be deducted so much as such like articles, according to a statement made by surveyors, lose in an ordinary way.

SEC. 644. If, in cases allowed by law, a contract shall have been made under the general name of goods or wares, or on any object whatsoever that may constitute the insured interest, and the risk was on objects likely to be subject to deterioration or decrease, the underwriter shall only be liable to pay the damage, according to the custom prevailing, at the place where the contract of insurance was effected.

In case of a dispute, the court shall decide after consultation with experts.

If any of the above mentioned goods come under the description of articles that, at the place where the contract of insurance was entered into, ordinarily are insured free of particular average, leakage or liquefaction, the underwriter shall not be bound to pay the damage or loss.

SEC. 645. In the case of goods mentioned in the preceding section, and specifically named in the policy, without any special clause on the question of average, the underwriter shall not be liable for average under three per cent.

## A TRANSLATION OF THE EIGHTH AND NINTH PARTS

OF THE

## GERMAN GENERAL MERCANTILE LAW.

VIII. AVERAGES.—IX. SALVAGE AND ASSISTANCE IN CASES OF  
DISTRESS.TRANSLATED FROM THE ORIGINAL BY ERNST EMIL WENDT, FENCHURCH BUILDINGS,  
FENCHURCH STREET, LONDON.

## EIGHTH PART.

## CONCERNING AVERAGE.

## FIRST ARTICLE.

## GENERAL AVERAGE AND PARTICULAR AVERAGE.

§ 702. All damage done to ship or cargo, or both, by the master or by his orders, with intent to save both from a common danger, as also the consequential damage resulting therefrom, and the expenses incurred for the same purpose, are general average. General average is borne by ship, freight and cargo in common.

§ 703. All damage and expenses resulting from an accident which do not belong to general average, as far as they do not come under § 622,\* are particular average.

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\* § 622. The ordinary and extraordinary sailing expenses, as pilotage, port dues light dues, steam towage, quarantine expenses, ice cutting, &c., fall upon the owner alone, except in case of an agreement to the contrary, even if he should not be bound by reason of the charter-party to do the acts which occasioned the expenditure. Cases of general average as well as expenses for salvage, preservation or securing of the cargo, are not included in this section.

Particular average is borne by the owners of the ship and cargo respectively, each for his own share alone.

§ 704. The application of the regulations laid down for cases of general average takes place, although the danger may have been occasioned by the fault of a third party, or even of one of the parties interested in the adventure.

The party so interested, however, to whom such fault is to be attributed, cannot only make no claim on account of any damage which may thereby have been occasioned to him, but is answerable to those who may be obliged to contribute to the general average for the loss which they may thereby sustain.

Should the danger, however, have arisen through the fault of one of the crew, the owner is answerable for the consequences as ordered by §§ 451, 452.\*

§ 705. Average distribution only takes place when ship as well as cargo, and both, either altogether or in part, have really been saved.

§ 706. The obligation to contribute to general average from an article which has been saved, is not annulled because the article is subject subsequently to particular average, unless it is totally destroyed.

§ 707. A claim for making good damage belonging to general average, is only so far set aside by a particular average subsequently affecting the damaged article (whether it be again

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\* § 451. The owner is answerable for any damage occasioned by any of the crew to a third party in the performance of their duties.

§ 452. The owner is, however, not personally answerable for the claim of a third party, but is only answerable with ship and cargo.

1. When the claim is made on account of a lawful transaction, concluded by the master as such, in consequence of the authority he lawfully possesses, and not with reference to a particular power of attorney.
2. When the claim is occasioned by the non-performance or the incomplete or improper performance of any arrangement made by the owner, as far as the carrying out of such arrangement belonged to the legitimate duties of the master, no matter whether the non-performance or the incomplete or improper performance was through fault of one of the crew or not.
3. When the claim is founded on a fault of one of the crew.

In the cases stated under Nos. 1 and 2, however, this section is not applicable, if any neglect in the performance of the arrangement is attributable to the fault of the owner himself, or if it is by himself that the arrangement has been carried out.



damaged or totally destroyed) as it is proved that the latter misfortune not only was in no way connected with the former, but that it would also have resulted in the former damage if this had not already been occasioned.

If, however, before the occurrence of the latter misfortune steps should already have been taken to reinstate the damaged article, then the claim for reimbursement holds good as far as such steps are concerned.

§ 708. The following cases are especially general average, always supposing that the requirements of §§ 702–704 and 705 are so far complied with, as nothing is otherwise particularly ordered by this section.

1. When goods, portions of the ship, or articles belonging thereto, are thrown overboard, masts cut away, ropes or sails cut adrift, anchors, chains or cables slipped or cut loose.

These damages, as well as any further damages caused to ship or cargo by such acts, belong to general average.

2. When, in order to lighten the vessel, the cargo has been either altogether or in part discharged into lighters.

To general average belong as well the hire of the lighters as also the damage which may have been done either to ship or cargo, by discharging into the lighters or by reshipping into the vessel, as also any damage which may have been done to the cargo while in the lighters.

If the lightening of the vessel must take place in the regular course of the voyage, there is no general average.

3. When the ship has been purposely run ashore, but only if prevention of sinking or of capture was thereby intended.

The damages caused by the stranding, as well as by the getting off, as also all the expenses of getting off, belong to general average.

An average distribution is not made if the ship, which has been stranded to avoid sinking, is not got off, or after being got off is found incapable of repair. (§ 444.\*)

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\* § 444. In the sense of this section a ship that has become unseaworthy is considered to be—

If the ship has been stranded without the stranding being purposely done for preservation of ship and cargo, then the damages caused by such stranding are not, but the expenses occasioned by the getting off, and the damages purposely inflicted on ship or cargo with this object are, general average.

4. If the vessel has put into a port of refuge in order to avoid a common danger threatening a ship and cargo in case the voyage were prosecuted, more particularly if the putting into port is in order to repair damage done to the ship during the voyage.

To general average belong in this case the expenses of entering and leaving, the expenses to the ship itself during the stay, the wages and provisions of the crew during the stay, also the expense of lodging the crew on shore if and as long as they could not remain on board; further, if the cargo must be discharged as a consequence of the cause which led to the ship putting into the port of refuge, the expense of discharging and reshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on board again. The several charges for detention are only taken for the time that the cause of putting into the port of refuge remains in force. If the cause is to be found in a necessary repair of the ship, the charges for detention are only taken for as long a time as that in which the repairs might have been completed.

The expenses of repairs to the ship only so far belong to general average, as the damage which is to be repaired is itself general average.

1. Incapable of repair, when the repair is altogether impossible, or cannot be done at the place where the ship is, and the ship cannot be moved to the port where the repairs might be carried out.
2. Unworthy of repair, when the cost of repair, without deduction of the difference between new and old, would amount to more than three-fourths of the former value.

When a vessel has become unseaworthy in the course of a voyage, the former value is taken as that which it had at the commencement of the voyage; in other cases as that which it had before it became unseaworthy, or would have had after a proper outfit.

5. When the ship is defended against enemies or pirates, all damage done to ship and cargo in such defence, the ammunition expended, and in case any of the crew is wounded or killed in such defence, then the expenses of his cure or burial, as also the compensations to be paid, (§§ 523, 524, 549, 551,\*) are general average.

\* § 523. In case the master becomes ill, or is wounded after the commencement of the voyage, the owner has to bear the expense of his care and cure:

1. If he returns in the ship, and the return voyage ends in the port to which the ship belongs, or in the port in which he was hired, then to the end of the return voyage.
2. If he returns in the ship, and the voyage does not end in one of the above-named ports, then to the end of six months after the conclusion of the return voyage.
3. If, in the course of the voyage, he has to be left on shore, then to the end of six months after the ship sets sail in prosecution of her voyage.

In the last two cases he has to receive a free passage home, with subsistence on the way, or a fair compensation, at his option.

The master, if he has become ill, or has been wounded and returns in the ship, receives his pay, and all stipulated profits up to the conclusion of the return voyage; if he has to be left behind on shore, up to the day when he leaves the ship. Should the master be wounded in the defence of the vessel, he has a further claim for reasonable compensation, the amount of which shall, if necessary, be fixed by a judge.

§ 524. Should the master die after he has entered upon his duties, the owner has to pay the wages earned by him, as well as all stipulated profits up to the date of his decease; if his death happens after the voyage has been commenced, the owner has also to pay the burial expenses.

Should the master be killed in protecting the vessel, the owner has further to pay a reasonable compensation, which shall, if necessary, be fixed by a judge.

§ 549. The sailor, who has become ill or has been wounded, receives his wages:

If he does not begin the voyage, up to the time when he leaves his duties.

If he begins the voyage and returns in the vessel, up to the end of the return voyage.

If, during the voyage, he has to be left behind on shore, up to the day when he leaves the ship.

If the sailor should be hurt in protecting the vessel, he has further a right to a reasonable compensation, which shall, if necessary, be fixed by a judge.

§ 551. Should the sailor die after he has entered upon his duties, the owner has to pay the wages he has earned up to the date of his decease, and also the burial expenses. Should the sailor be killed in protecting the vessel, the owner has further to pay a reasonable compensation, which shall, if necessary, be fixed by a judge.

6. When the vessel has been detained by enemies or pirates, and is redeemed by payment.

What is paid for redemption, together with the maintenance and ransom of the hostages, is general average.

7. When losses and expenses have been incurred in obtaining the moneys necessary for payment of general average during the voyage, or when expenses have been incurred in apportioning the amounts among the parties interested.

These losses and expenses also belong to general average.

Hereto belong more particularly the loss on goods sold during the voyage, the bottomry premium when a bottomry bond has been given for the advance of the necessary moneys; when this is not the case, the premium of insurance on the moneys expended, the expenses of determining the damage, and of making up the account of the general average (average statement.)

§ 709. Not as general, but as particular average, are considered:

1. Losses and expenses incurred in procuring moneys rendered necessary in consequence of a particular average, even if in the course of the voyage.
2. Expenses of reclaiming, even if ship and cargo are reclaimed together, and both successfully.
3. Damage done to the ship, its appurtenances, and the cargo, by carrying a press of sail, even when the press of sail was carried to avoid stranding or capture.

§ 710. In cases of general average, damages and losses occurring to the following articles are not allowed for in making up the statement:

1. Goods not laden under deck; this regulation does not, however, apply to the coasting trade, when deck cargoes are allowed by the laws of the country to be carried in such coasting trade. (§ 567.\*)

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\* § 567. Without consent of the shipper goods may neither be laden on deck nor hung to the sides of the ship.

The laws of the respective countries, however, possess the right of declaring that the above regulation, as far as concerns the loading on deck, is not to apply to the coasting trade.

2. Goods, respecting which neither a bill of lading has been signed, nor have the same been entered on the manifest or in the cargo book.
3. Valuables, specie and paper currency, respecting which proper notice has not been given to the master. (§ 608.\*)

§ 711. Damage done to the vessel and its appurtenances, and belonging to general average, if it is to be made good during the voyage, must be surveyed and estimated by competent persons at the port where it is to be made good, and before the repairs are commenced, otherwise at the port where the voyage terminates. The estimate must at the same time include the probable cost of the necessary repairs. If the repairs are done during the voyage, the estimate decides the amount to be allowed for the damage, except when the cost of completing such repairs is less than the estimated amount. If it was not possible to make an estimate, then the amount really laid out on the necessary repairs is decisive.

So far as the repairs are not completed during the voyage, the estimate is solely decisive in the settlement of the damages.

§ 712. The full amount of the repairs when settled, according to the provisions of the preceding section, is the amount to be allowed in average, if, at the time of the casualty, the vessel had not been afloat for a whole year.

The same rule applies in allowing for separate parts of the ship, and particularly for the metal sheathing, and for separate parts of the appurtenances, when such parts have not been in use for a whole year.

In other cases a deduction is made for the difference between new and old of one-third of the whole amount; in the case of chain cables, however, only one-sixth, and with the anchors themselves no deduction at all is allowed.

From the total amount are further to be deducted the proceeds or value of the old articles, if they shall be in existence, which have been or are to be replaced with new.

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\* § 608. The owner of the ship is not answerable for valuables, specie and paper money, unless the description and value of the articles was notified to the master when they were put on board.

If such a deduction, and also the deduction of new for old have to be made, the latter is first to be deducted, and afterwards the other deduction is to be made from the remainder.

§ 713. The amount to be allowed for goods which have been sacrificed, is determined by the market price of goods of the same description and quality at the port of destination, at the time when the discharge of the ship was commenced.

When no market price can be got at, or when doubts may arise as to such price or its applicability, more particularly as regards the quality of the goods, the value must then be settled by competent persons.

From the value are to be deducted whatever sums, in respect of freight, duties and charges, have been saved by the loss of the goods.

As sacrificed goods are considered also such as may have been sold to satisfy general average. (§ 708, No. 7.)

§ 714. The amount to be allowed for goods which have suffered damage belonging to general average, is determined by the difference between the value of the goods in their damaged state at the commencement of the discharge of the vessel, which is to be settled by competent persons, and the market price, as stated in the preceding section, after deduction of all dues and charges, as far as such may have been saved in consequence of the damage.

§ 715. In fixing the amount which is to be allowed, (§§ 713, 714,) a deduction is to be made on account of decrease of value and losses which may have occurred before, at or after the casualty, not belonging to general average.

§ 716. If the voyage does not terminate with regard to ship and cargo at the port of destination, but at another port, such latter port takes the place of the port of destination for the determining of the general average allowance: whereas, if the voyage terminates by the loss of the ship, the place to which the cargo is brought in safety becomes the port of destination in like manner.

§ 717. The allowance for freight not earned is to be determined by the amount which would have been due on the sacrificed goods, if they had been carried on by the ship to the port

of destination ; or, if the ship does not arrive at the port of destination, if they had been delivered at the port where the voyage terminates.

§ 718. The total amount of the loss which forms the general average is apportioned among ship, cargo and freight, in proportion to the value and amount of the same.

§ 719. The ship with its appurtenances contributes :

1. According to the value, in the condition in which it was at the end of the voyage, when the discharge was commenced.
2. With the amount taken as general average on the ship and its appurtenances.

From the value under No. 1, is to be deducted the existing value of those repairs which have been done, and of those articles which have been added since the occurrence of the casualty.

§ 720. The cargo contributes :

1. With the goods still existing at the end of the voyage when the discharge was commenced ; or, if the voyage terminates by the loss of the ship, (§ 716,) with the goods that have been brought into a place of safety, so far as at the time of the casualty these goods, in both cases, were on board the vessel or a lighter. (§ 708, No 2.)
2. With the goods sacrificed. (§ 713.)

§ 721. In estimating the amounts, the following points have to be taken into consideration :

1. With respect to goods which are undamaged, the market value, or the value as fixed by competent persons, (§ 713,) of the goods at the end of the voyage, when and at the place where the discharge was commenced ; or, if the voyage is terminated by the loss of the ship, (§ 716,) at the time and place of the salvage, after deducting freight, duties and other expenses.
2. With respect to goods which have been spoilt during the voyage, or have suffered damage not belonging to general average, the value as fixed by competent persons (§ 714) of the goods in their damaged state at the time and place stated in clause 1 of this section, after deduction of freight, duties and other expenses.

3. With respect to goods which have been sacrificed, the amount at which they are estimated, under § 713, for general average.
4. With respect to goods which have suffered damage belonging to general average, the value, as estimated under clause 2 of this section, of the goods in their damaged state, and the difference of value at which, according to § 714, the damage is taken as general average.

§ 722. If goods are thrown overboard and should be picked up, they have only to contribute to a general average occurring at the same time or subsequently, in case the owner demands compensation.

§ 723. The freight contributes with two-thirds :

1. Of the gross amount earned.
2. Of the amount estimated as general average according to § 717.

The laws of the respective countries retain the power of reducing the above stipulated proportion of two-thirds to one-half.

Passage moneys contribute with the amount which would have been sacrificed if the ship had been lost, after deducting the expenses which would then have been saved.

§ 724. If a contributory article is liable for a claim arising out of a subsequent casualty, it has only to contribute with its value after deduction of this claim.

§ 725. The following do not contribute to general average :

1. Ammunition and provisions of the ship.
2. Wages and effects of the crew.
3. Baggage of passengers.

If articles of this description have been sacrificed, or have sustained damage which comes under general average, compensation is made for them as provided by §§ 713-717; compensation is, however, only made for private effects, consisting of valuables, specie or paper money, when they have been duly notified to the master. (§ 608.\*) Articles of this description, for which compen

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\* See note on page 110.



sation is made, contribute with the value, or difference of value, at which they are taken in the average statement.

The articles enumerated in § 710 contribute as far as they have been saved.

Money advanced on bottomry is not liable to contribute.

§ 726. If, after the casualty, and before the commencement of the discharge at the end of the voyage, a contributory article is totally lost (§ 706) or partially lost, or diminished in value, more particularly in the case stated in § 724, a corresponding increase takes place in the amounts to be contributed by the remaining articles.

If the loss or diminution of value occurs after the commencement of the discharge, the amount for which such article is liable to contribute, as far as the article is inadequate to the satisfaction of a claim, falls as a loss on the claimant.

§ 727. Claimants on account of general average have the same rights as ships' creditors with respect to the amounts due from the ship and freight. With respect to goods which have to contribute, they have a lien on the separate goods for the amounts for which each is liable. Such lien, however, cannot, after delivery of the goods, be enforced to the prejudice of third parties, who have *bona fide* come into possession of them.

§ 728. An average loss in itself does not constitute a personal liability for payment of the average amount.

The receiver of goods from which a contribution has to be received, if such fact was known to him when he received the goods, is, however, personally liable for such amount up to the value of the goods at the time of their delivery, in so far as the amount could have been recovered out of the goods themselves if they had not been delivered.

§ 729. The loss is to be determined and apportioned at the port of destination ; or, if that is not reached, at the port where the voyage terminates.

§ 730. The master is bound to cause the average statement to be made up without any delay. If he acts contrary to this obligation, he renders himself liable to every party interested.

If the making up of the average statement is not proceeded with with proper despatch, any party interested can require and urge on its being made up.

§ 731. Under the jurisdiction of this code, the average statement is to be made up by the persons regularly appointed for the purpose, or, in their absence, by parties especially authorized by the court (average staters.) (Compare § 57, clauses 1-7 of the Introductory Law.\*)

Every party interested is bound to furnish the average stater with all documents necessary for making up the statement as far

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\* § 57. *Introductory Law.*—The following regulations are hereby laid down for the stating and settling of averages :

1. As soon as the average statement is made up, the average stater shall lay the same before the Court of Commerce. It is the duty of this court to examine the statement, and if mistakes or omissions are found, to have the same corrected by the average stater.
2. After the statement has been examined, and, if necessary, corrected, the parties who have to contribute, if they have announced themselves to the court, or are known in other ways, more particularly by the ship's papers or cargo accounts, are to be invited to appear before a deputy of the court on a fixed day if they reside in the district of the court, or have appointed representatives there, otherwise, in the person of an official agent, who will be appointed to act for them, in order to make their several objections to the statement.

To the summons is to be attached the announcement, that any party not appearing will be considered to have no objection to make to the statement.

3. If, at the stated time, no objections are made to the statement, then the court shall confirm the same.
4. If an interested party makes objections, he must prove them in the sitting appointed, or must reserve the right of putting in a written statement of his grievance. In the latter case, the statement must be laid before the court within fourteen days; if this should not be done, it will be considered that the official record of the sitting is to serve as such statement.

The ordinary legal steps will be taken by the court on the statement of grievance; or should such not have been reserved, or not have been put in during the interval of fourteen days to be allowed as above, then on the copy of the official record of the sitting which is to serve as a statement.

5. When the objections which may have been brought forward have been settled by a legal decision, or otherwise, then the court shall proceed to confirm the average statement, the same having first been duly amended in conformity with the settlement of the objections.
6. When objections are raised which only affect a portion of the average statement, the court shall at once confirm the statement so far as the same is not affected by the objections.
7. When the average statement has been so confirmed, immediate execution may be granted upon it.

as they may be under his control, viz.: Charter-parties, bills of lading and invoices.

To the laws of the respective countries is reserved the right of making further regulations respecting the drawing up of the average statement, and the settling of the same.

§ 732. Security shall be given to the parties interested in the cargo for the amounts due from the ship, before the latter can be allowed to leave the port in which, according to § 729, the apportionment and arrangement of the loss is to take place.

§ 733. The master is not allowed to deliver goods, from which a contribution to average may be due, until the amount of such contribution shall have been paid, or security given for the same; (616;)\* in default of which, in addition to the liability of the goods, he becomes personally liable for the amounts.

If the master shall have acted in accordance with instructions from his owner, then the directions of the second and third parts of § 479† are to be acted upon.

The lien which parties entitled to compensation have on the contributory goods, is exercised for them by the master or owner.

§ 734. If the master shall have given a bottomry bond on the cargo, or have disposed of a part of the same by sale or otherwise, in order to be able to continue the voyage, although for an expense which does not belong to general average, then the loss which the party interested in the cargo may sustain, because his claim cannot be satisfied, or can only partly be satisfied by ship and freight, (§§ 509, 510, 613,)‡ shall be borne by the whole of the

\* § 616. The master or owner is not bound to deliver the goods, before the amounts due from the same for general average, salvage, assistance or bottomry have been paid, or security given for the same.

If a bottomry bond has been given for account of the owner, the above regulation holds good, in spite of the obligation of the master and owner to free the goods from their liability to the bottomry before they are delivered.

† § 479 (part of.) The master is not freed from his liability to other parties because he may have acted by order of his owner.

By such orders, however, the owner becomes personally liable, if, on giving them, he was acquainted with the facts.

‡ § 509. When a case of general average does not exist, the master is not justified in giving a bottomry bond on the cargo, or in disposing of portions of the cargo by sale or otherwise, except when he cannot get out of his difficulty in any

parties interested in the cargo, according to the regulations laid down for cases of general average.

In settling the loss, the compensation fixed in § 713 is decisive in all cases, and particularly in such as come under the second part of § 613. Goods which have been sold also contribute to general average, should such occur, (§ 720,) with the value at which such compensation may be determined.

§ 735. With respect to other losses and charges to be divided according to the principles of General Average, the necessary instructions are given in § 637.\*

The amounts and compensations to be paid under the stipula-

other way, or when the employing of other means would entail a disproportionate loss upon the owner.

In such cases, also, he can only hypothecate the cargo in conjunction with ship and freight.

He is bound to raise money by bottomry, and not by sale, unless the borrowing on bottomry would entail a disproportionate loss upon the owner.

§ 510. In all cases coming under the preceding article, the hypothecation of the cargo, or the disposing of portions of the same by sale or otherwise, will be considered as a credit transaction entered into for account of the owner.

§ 613. The regulations of § 612<sup>1</sup> are also applicable to those goods, for which the ship owner, according to § 510, must make compensation.

If, in a case where goods have been disposed of by sale, the net proceeds exceed the value according to § 612<sup>1</sup>, then, in the place of the latter value, the net proceeds are to be taken into calculation.

<sup>1</sup>§ 612.—“When, in virtue of § 607, compensation has to be made for the loss

“of goods, such compensation shall only be for the value of the goods lost.

“This value shall be decided by the market price of goods of the same descrip-

“tion and quality at the port of destination of the lost goods at the commence-

“ment of the discharge of the ship; or, if the cargo is not discharged at that

“port, then at the time of her arrival. When no market price can be got at,

“or when doubts may arise as to such price or its applicability, more particu-

“larly as regards the quality of the goods, the value shall then be settled by

“competent persons. From the price shall be deducted freight, duties and

“expenses saved in consequence of the loss of the goods.”

“When the port of destination of the goods is not reached, then is taken in its

“stead the place where the voyage ends; or, if it ends by the loss of the ship,

“then the place to which the goods may be brought in safety..

\* § 637. When the vessel, after taking in its cargo, is detained in the port of loading before the commencement of the voyage, or in an intermediate port, or a port of refuge after its commencement, by any of the emergencies mentioned in

tions of § 637 and of § 734, are in all respects placed on the same footing as payments and compensations in cases of general average.

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§ 631<sup>1</sup>, then the expenses of such detention (even if the requirements of general average are not present) are divided among ship, freight and cargo, according to the principles of general average, whether the contract is thereby put an end to, or afterwards completely fulfilled. The expenses of the detention include all the expenses enumerated in the second clause of § 708, No. 4; but only those of putting into and leaving port when the vessel has put into a port of refuge on account of the obstacle.

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§ 631. "Either party is at liberty to withdraw from the agreement without being liable for damages.

a.—"When before the commencement of the voyage:

"An embargo is laid on the ship, or she be arrested for the service of the country, or of a foreign power."

"The trade with the port of destination is prohibited."

"The loading port, or the port of destination are blockaded."

"The export from the port of lading of the goods to be shipped by the contract, or their import into the port of destination is prohibited."

"The ship is prevented from leaving port, or the voyage or shipment of the cargo is stopped by other exercise of authority."

b.—"When, before commencement of the voyage, war has been declared, in consequence of which the ship, or the goods to be shipped according to contract, or both, can no longer be considered free, and would be liable to risk of capture."

## SECOND ARTICLE.

DAMAGE BY COLLISION.

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§ 736. When two ships come into collision, and either on one or both sides, in consequence of such collision, ship or cargo should be damaged or entirely lost, then in case any of the crew of either ship should have occasioned the accident by any fault of his own, the owner of that ship is answerable according to §§ 451-452\* for the repairs of the damage which may have been done to the other ship or her cargo by the collision.

The owners of the cargo in either ship are not liable to contribute to the repairs of the damage.

The personal liability of the crew for the consequences of their faults is not altered by this section.

§ 737. If no fault is attributable to any of the crew of either vessel, or if the collision is occasioned by faults on both sides, then no claim can be established for the damage done to either or both ships.

§ 738. The two preceding sections are applicable whether both vessels, or either of them, are under sail or drifting with the current, or are at anchor or fastened to the shore.

§ 739. When a ship which has been damaged by collision sinks before it can reach a port, it is taken for granted that the sinking of the ship was a consequence of the collision.

§ 740. When the ship is in charge of a pilot (where pilotage is compulsory) and the crew have performed the duties required of them, the owner of the ship is then not responsible for the collision caused by the pilot.

§ 741. The provisions of this article are also applicable when more than two vessels come into collision.

When in such a case the collision shall have been occasioned by the fault of any of the crew of one of the vessels, then the owner of such vessel is answerable also for damage which may be occasioned in consequence of the second vessel through the collision being driven into collision with a third.

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\* See note on page 104.

## NINTH PART.

## CONCERNING SALVAGE AND ASSISTANCE IN CASES OF DISTRESS.

§ 742. When, in case of distress, a ship or its cargo, being no longer under the control of the crew, or having been abandoned by the same, are taken charge of either wholly or in part by third parties and brought into safety, then such parties have a claim for salvage.

When in any other case than the above, a ship or its cargo are rescued from a state of distress by the help of third parties, then such parties have only a claim for assistance.

The crew of the vessel which is lost or in danger can have no claim for salvage or assistance.

§ 743. When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon is excessive, and the reduction of the same to an amount more in accordance with the circumstances of the case may be demanded.

§ 744. In the absence of any agreement the amount of the salvage or assistance shall be fixed by the judge in money, all the circumstances of the case being taken into reasonable consideration.

§ 745. The amount awarded for the salvage or assistance, also includes compensation for any outlay which may have been made for the purposes of the salvage or assistance.

It does not include, however, the costs and fees of the legal authorities, the duties and charges to which the salvaged articles may be liable, or the expenses of storing, preserving, valuing or disposing of the same.

§ 746. In settling, the amount to be awarded for salvage or assistance are to be taken into consideration; more particularly—

The zeal proved.

The time expended.

The services rendered.

The outlay incurred.

The number of persons who assisted.

The danger to which they and their vessels were exposed,  
as also

The danger which threatened the salvaged and rescued articles,  
and

The value of the same remaining after deduction of the expenses. (§ 745, clause 2.)

§ 747. The award for salvage or assistance shall not be fixed at a proportion of the value of the salvaged or rescued articles, unless all parties shall mutually agree thereto.

§ 748. The amount of the salvage shall not exceed the one-third part of the value of the articles salvaged. (§ 746.)

Only in exceptional cases the amount may be increased up to the half of the value, when the salvage was accompanied with unusual exertions and risks, and at the same time such value is only small.

§ 749. The amount awarded for assistance shall always be less than the amount of salvage would have been in the same circumstances.

In settlement of the amount to be awarded for assistance, the value of the articles rescued is only of secondary importance.

§ 750. When several persons have taken part in the salvage or rendering of assistance, the amount awarded shall be divided among them in proportion to the services that each may have rendered, either personally or with his property, and in case of dispute, according to the number who have to participate.

Those who in the same casualty devoted themselves to the saving of human life, are entitled to participate equally with the others.

§ 751. When the ship or its cargo are either wholly or in part



salved or preserved by another ship, then the amount awarded for salvage or assistance is divided between the owner, the master and the rest of the crew of the other ship, unless it shall have been otherwise specially agreed between them, in such proportion that the owner shall take one-half, the master one-quarter, and the rest of the crew the other one-quarter. Among the latter the amount shall be divided in proportion to the pay to which each is entitled, or to which, according to his rank, he is entitled.

§ 752. No person has any claim for salvage or assistance:

1. Who has forced the acceptance of his services, or more particularly has gone on board the ship without permission of the master, when the latter was present.
2. Who has not immediately given notice to the master, the proprietor, or the proper authority respecting the goods saved.

§ 753. With respect to the salvage and assistance expenses, which shall be understood to include the amount awarded for such salvage and assistance, the creditor has a lien on the salved or preserved articles, and with respect to the salved may detain them until security for the amount has been given.

In enforcing the lien, the stipulations of the second and third clauses of § 697\* shall be applied.

§ 754. The master may not deliver the goods either wholly or in part, until the creditor has been paid or has received security, otherwise he makes himself personally liable to the creditor, so far as the latter's claim could have been satisfied out of the delivered goods at the time of their delivery.

If the master shall have acted in accordance with instructions

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\* § 697. If the amount of bottomry is not paid when it is due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken, as also to hand over the bottomried freight.

The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery, against the master; if after its delivery, against the receiver, so long as it is in his own possession, or in the custody of any person holding it for his account.

The creditor can make no use of his rights to the prejudice of a third party, who has *bona fide* become possessor of the bottomried cargo.

from his owner, then the directions of the second and third clauses of § 479\* come into operation.

§ 755. Salvage and rendering of assistance do not of themselves impose a personal responsibility for payment of salvage and assistance expenses.

But the receiver of the goods, when it is known to him at the time he received them that the same were liable for salvage or assistance expenses, becomes personally liable for such expenses, so far as they could have been satisfied out of the goods themselves, had they not been delivered.

If other articles have been salvaged or preserved, together with the goods which have been so delivered, then the personal liability of the receiver only extends to the amount which falls upon the goods delivered, if the expenses are divided among the whole of the articles.

§ 756. The laws of the respective countries retain the right to amend the provisions of this ninth part.

They can enact that other than legal tribunals shall, with the reservation of an appeal to law, (§ 744,) be called upon to decide questions as to liability to the payment of salvage or assistance claims, or as to the amounts to be awarded in such cases.

The regulations of the different countries as to the recapture of a ship taken by the enemy, do not come under the provisions of this part.

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\* See note to page 116.

## E X T R A C T S

FROM THE

## SWEDISH MARITIME CODE OF FEB. 23, 1865.

TRANSLATED BY CHARLES G. YOUNGBERG, Esq., VICE-CONSUL OF SWEDEN AND NORWAY,  
AT THE CITY OF NEW-YORK.

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§ 143. The principal compensations to be made through general average are:

1. Merchandise and appurtenances belonging to the vessel, which have been thrown overboard in order to ease the vessel in danger at sea, or when the vessel is chased by an enemy; also the damage done to the vessel or cargo by this operation, or that occurs in consequence of the preparations for the same.
2. The same as goods thrown overboard are to be considered merchandise or the vessel's appurtenances, which, in order to ease the vessel in danger at sea, are discharged into other vessels and thereby become lost or damaged, as well as the cost of hiring such vessel.
3. Masts and appurtenances of the vessel, that are cut away or in any other manner sacrificed in order to save the vessel and cargo; as, for instance, in order to get the vessel from off the ground, to prevent it from being capsized, or to bring the vessel under sails, &c.
4. All damage to vessel or goods occasioned by deliberately running the vessel aground, when she has become leaky, or, from other causes, is no more in a seaworthy condition; also the expense of getting the vessel afloat and into a ship wharf; also the putting of the goods in safety, and also the damage done to the appurtenances belonging to

the vessel in getting the vessel off the ground. If the vessel has, through disaster, got aground, then no other damage shall be compensated for by general average than the cost of getting the vessel afloat, or bringing it and the goods into safety.

**THE EXPENSES.**—When, in order to avoid a danger which, during the continuation of the voyage, threatens equally the vessel and the cargo, the vessel enters a port of refuge. In these expenses are enumerated, the cost of engaging outside assistance for bringing the vessel into and out of such port of refuge, pilotage, light-house, harbor or any other dues; damages done to the vessel, in order to discharge the cargo. expenses for discharging cargo; the storing, reshipping and stowing of the same, when the goods must be discharged in order to bring the vessel into port, or in order to repair the same; the support of the crew while the vessel remains in such port of refuge.

The expense for the stay of the vessel is only computed for the time the cause of the vessel's entering a port of refuge still exists. If the said cause consist in the necessity of repairing the vessel, then the expenses are only computed for the time in which the necessary repairs could have been completed. The cost of repairing the vessel is only then allowed in general average when the damage itself is such. When the voyage terminates in the port of refuge, then is considered as general average only the expenses of bringing the vessel into the port, and the support of the crew until it became settled that the voyage should terminate in said port of refuge.

5. Damage done to the vessel or goods in order to put out fires on board.
6. Damage done to the vessel or goods during the defence against enemies, pirates or corsairs, and the ransom paid for the redemption or release of the ship and goods, or the ransom paid for any one of the crew, who, while in the service of the vessel, has been carried away by violence or given as hostage; also the expenses for the support, medicines and rewards for any one, who during the combat was wounded;

for the burial of the one that may have been killed, and for a donation to his widow and children. The last named expense shall also be allowed for one who, while in the service of the vessel in distress, through his work at such time, is hurt or killed.

7. The expense of saving such articles as, if they had not been saved, would be taken into general average. In the same manner is allowed the damage done to such articles.
8. Freight on the goods which are paid for by general average, or which, as further mentioned in Art. 11 below, are sold in any other port than the one to which the vessel was destined. If the voyage terminates before the arrival of the vessel at her destination, then the freight for the goods thrown overboard or sold, is only to be allowed the same as for those which still remain in the vessel.
9. Expenses incurred in protecting the vessel from damage by ice, when the same is in a harbor surrounded by ice.
10. All expense incurred in entering and extending protest and declaration by reason of any damage mentioned in this section, as well as the valuation of vessel and goods, in order to ascertain the share each has to contribute towards the general average.
11. Expense and loss while in such port of refuge in obtaining funds necessary to be expended for the mutual benefit by vessel, freight and cargo, or in order to pay such expenses as will be included in general average, as, for instance, loss occasioned by reason of the difference in price obtained for a part of the cargo which must be sold in order to obtain funds. The premium for bottomry bond, when such must be given, in order to procure the money necessary to be expended on mutual account. Expenses of issuing bills of exchange, insurance and lawful interest, when the means are obtained in any other way.
12. Expense for ascertaining and distributing all the damage and expense mentioned in this paragraph.

§ 144. General average still exists, although the danger which caused it was occasioned by the commander, owner or charterer, or when the commander, without sufficient ground, has undertaken the action, which caused the general average. Action at

law is, however, admissible against the party who caused the disaster, and such party shall forfeit his share in the general average.

§ 145. The owner of goods or vessel shall not be liable, without special agreement, to contribute more towards general average than the value of that for which he participates in the same.

\* \* \* \* \*

§ 158. The damage is divided over the vessel, cargo and freight, in proportion to the value of each.

§ 159. The vessel participates in the general average according to—

1. The value of the vessel, after the damage has occurred, estimated by competent appraisers appointed in accordance with § 151; and,
2. The amount of the damage done to the vessel and its appurtenances, and which, according to § 152, is to be compensated in general average.

The danger ceases in the port where the vessel parts with her cargo, or in the port where it may be necessary for the vessel to enter in order to repair.

§ 160. The cargo participates in the general average according to—

1. The value of all the goods which, at the time of the disaster, were on board, and which were not lost before the arrival of the vessel in the port where the danger ceases. The value of the undamaged goods to be ascertained as stated in § 153, and for damaged goods according to § 155; and,
2. The estimated value of such goods as have been lost or damaged in general average. Regarding the port where the danger ceases, see next preceding paragraph.

§ 161. The freight participates in the general average with one-half of—

1. The freight earned; and,
2. The freight counted in for compensation in the general average.

Where no certain freight has been fixed, it is to be ascertained as stated in § 5.

## EXTRACT

FROM THE

## NORWEGIAN MARITIME CODE OF MARCH 24, 1860.

TRANSLATED BY CHARLES G. YOUNGBERG, VICE-CONSUL OF SWEDEN AND NORWAY,  
AT THE CITY OF NEW-YORK.

## CHAPTER SIXTH.

## GENERAL AVERAGE.

§ 69. In applying the rules laid down in this chapter a general average is established, through losses or damages occasioned in the endeavor to save the vessel and cargo from a greater disaster. General average, therefore, compensates what, under such circumstance, is sacrificed.

\* \* \* \* \*

4. Damage caused by deliberately running the vessel aground when she is pursued by an enemy, or is no longer in a seaworthy condition, and the escape from imminent danger is thereby sought.

5. Damage done to the vessel or cargo in order to put out fire on board ; as, for instance, by cutting holes in the vessel and filling it with water.

6. Damage to the vessel or cargo caused by defending the same against enemies ; only, however, in such case when both the vessel and the cargo were in danger from the attack, and, as a *consequence*, the damage to the vessel does not concern the cargo, unless the cargo is of a nature to be condemned in case the vessel is captured.

\* \* \* \* \*

8. Expense incurred in seeking a port of refuge when the

vessel, in consequence of imminent danger, can no longer remain at sea. On the contrary, these expenses are not taken into general average when the vessel enters a port of refuge in order to escape from an enemy, or by reason of contrary winds, ice, want of provisions, or other similar cause.

In the expenses in a port of refuge are included—

*a.* Pilotage, harbor and other public dues that accrue to the vessel or cargo, but not the duty on goods that are sold in a port of refuge or are to remain there.

*b.* Expense in discharging, warehousing and reshipping the cargo, but not the money paid laborers for moving the cargo while in the storehouse, or any other arrangement for the preservation of the same, nor the premium for insuring against fire while the cargo is on storage.

*c.* Commissions paid to agents, so far as they are not considered as including charges for making arrangements for, or superintending the preservation of the cargo.

*d.* Wages and support of master and crew, which are calculated for the time during which the vessel necessarily must remain, in order to have the damage repaired.

If the preservation of the cargo made it necessary to seek a port of refuge, then the expenses mentioned in *a.* and *d.* are considered as general average, but not those mentioned in *b.* and *c.*

If the vessel, after entering a port of refuge, is found unfit to continue the voyage, or if the voyage for any other cause terminates in such port of refuge, then the expenses mentioned in articles *b.* and *c.* cannot be included in the general average; the expenses mentioned under letter *a.* only so far as concerns the entering of the vessel, and the expenses under letter *d.* only for the time during which the vessel was obliged to remain, before it was decided that the voyage should terminate there.

9. Expenses in saving such articles as, if they had not been saved, would have been paid by contribution in general average.

\* \* \* \* \*

§ 75. The sum that is paid in general average is divided on the vessel, cargo and the one-half of the freight, according to the following rules:



1. The vessel contributes according to its value in the condition in which it arrives in port, whether it be the port of refuge or of destination, with the addition of the sum which, after the deduction mentioned in § 74, has been made, is taken into general average as a compensation for damage to the vessel and its appurtenances.

The value of the vessel is determined by appraisement, unless it be sold as wreck, in which case the sum received from the sale is to form the basis. In order to avoid the expense which may be occasioned by an appraisement, it shall be allowable for the master and the consignee of the cargo to agree upon taking the value at which the vessel is insured, less the damage sustained for a basis; or in case the vessel is not insured, then to agree upon some reasonable value.

2. The value of the cargo is ascertained in the manner shown in § 73, including in the value goods which are compensated for by general average. If the goods have, before the vessel enters a port, suffered such damage as cannot be considered as general average, then the value as appraised will be put lower in proportion to the damage sustained; but for any damage sustained after arrival of vessel in port, be it a port of refuge or destination, no deduction is allowed. In every instance the owner has a right to deliver up the goods for the contribution in general average. Money, silver, gold and precious stones contribute only for the one-half of the value.

3. The freight, in which is included the compensation mentioned in § 69, art. 11, contributes only with one-half. When the vessel does not reach its port of destination, then this one-half is only to be allowed to the port of discharge.

§ 76. From contribution in general average is excepted whatever cannot be considered as part of the cargo; as, for instance, provisions and ammunitions, money, clothes and other effects belonging to the master, crew and passengers.

§ 77. General average should be settled in the port where the voyage terminates and the cargo is discharged.

## CUSTOMS OF ANTWERP,

IN POINTS AS TO WHICH THERE IS THE GREATEST DIVERGENCE  
OF OPINION IN MATTERS OF GENERAL AVERAGE.

BY EDWARD VAN PEBORGH, DESPACHEUR, AND THEODORE C. ENGLES, UNDERWRITER,  
OF ANTWERP.

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It is superfluous in us to mention that we consider merchandise jettisoned, masts, sails and rigging cut, anchors, chains and other objects abandoned for the common safety of ship and cargo as general average; for in this all the countries of the world are agreed.

We intend to explain the principal points about which there is controversy, and of which the adjustment is not every where alike uniform.

We commence with port of refuge expenses :

The constant custom of Antwerp in what concerns the going into a port of refuge is in conformity with the doctrine of VALIN. We consider as a general average act the resolution taken to enter into a port of refuge, whether in consequence of an accident of the sea, which puts the ship and cargo in danger, or of a voluntary sacrifice ; and we admit, in principle, that there is a strict community of interest between the ship and cargo up to the moment when the ship, with its cargo on board or partially discharged into lighters, is anchored in safety in the port of refuge.

The community of interest is considered as interrupted from the moment when the cargo (if it has been judged necessary to unload it) is separated from the ship or from lighters, in order to be landed. The community is restored from the moment that

the cargo is replaced on board the primitive ship, or on board lighters to be conveyed there.

Proceeding from this point of view, damages and expenses are arranged in three categories.

#### FIRST CATEGORY.

*General Averages.*—The expenses of hiring lighters ; of going into and coming out of port ; the hire of day-laborers employed to pump the ship as long as the cargo is on board ; judicial expenses ; the fees of consuls and notaries, agents, commissions, &c. The reparation of damages voluntarily suffered, subject to a deduction of one-third for the difference between new and old, upon all the materials and labor, except chain cables, which are subject to a deduction of fifteen per cent., and anchors, which are not subject to any deduction. If the ship is entirely new and on its first voyage, there is no deduction made on account of the difference between new and old.

#### SECOND CATEGORY.

*Expenses belonging to the Cargo.*—The unloading, landing, transporting to the warehouse ; the storage or hire of warehouses ; surveys upon the cargo ; the reloading or putting the cargo on board lighters to be transported to the ship.

#### THIRD CATEGORY.

*Expenses belonging to the Ship.*—The reparation of damages happening to the ship by the fortunes of the sea, and whatever is accessory, as well as the wages and provisions of the crew, and other expenses particular to the ship. We admit in principle that the cost of the reparation of a damage constitutes the damage itself. Hence, however highly expensive the reparation of a damage proceeding from a particular average may be, the excess of cost is never admitted in general average. If the freight is insured, the insurer of the freight reimburses the ship-owner for the wages of the crew, according to the shipping agreement, and for the provisions, according to a fixed tariff.

Commissions for the advance of funds, bottomry premiums, interest, and the loss upon merchandise sold in the port of refuge to procure funds, are apportioned, *pro rata*, over the different classes of average, according to their respective amounts. If the proceeds of merchandise sold in the port of refuge, in order to procure funds, leaves a benefit, this benefit is deducted from the amount of the general average.

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Proceeding from the point of view that the community of expenses continues to subsist up to the moment when the cargo is separated from the ship, we ought to observe, that it is also the constant custom of Antwerp to carry the expenses specified in the second category to the charge of the cargo when, only, there has been a *total* unloading of the cargo; but, in the case of a *partial* unloading, these same expenses are admitted in general average; as if, in order to be able to remove a broken mast and put in its place a new one, a part of the cargo is unladen, the greater part remaining on board, then we rank in the class of general average the expenses of unloading, the storage and the reloading of the merchandise which had been landed. Without becoming the defenders of this system, we ought, nevertheless, to acknowledge that it is logical in view of the doctrine of VALIN, which still prevails in Antwerp. In fact, in a discharge of the entire cargo, all the shippers are placed on the same footing; the community of interest is interrupted by the separation of the cargo from the ship, and hence, all the shippers support conjointly the expenses relative to the sojourn of the cargo in the port of refuge. But in a partial unloading, the community of interest not having been interrupted, and the partial unloading having taken place only in view of the general good, it would be unjust to make the shippers, whose goods have been unladen, alone defray the expenses of their landing, storing and reloading. We add, that this application of the law reposes upon a custom which the courts of Antwerp have never reversed.

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The consequences of going into a port of refuge (les conséquences

d'une relâche) on account of *vice propre*, are not considered as general averages.

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Damages resulting from stealing, fires and other accidents on land, are not considered to be general averages, but as averages particular, to be borne by the proprietor.

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Damages occasioned directly by a jettison to the other merchandise remaining in the ship, are admitted in general average; but the damage or injuries happening to the cargo by breaking or chafing, through the disarrangement of the stowage in consequence of a jettison, and the damage or loss of merchandise by unloading in the voyage, (*en route*), are not admitted in general average. The loss by a jettison of merchandise loaded on deck is not admitted in general average, except in short coasting voyages (*petit cabotage*).

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The jettison of rigging placed on deck in a position contrary to maritime usages, is not admitted in general average, whether in long or short voyages; neither is a jettison of boats hung in the davits or outside of the ship.

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Rigging and sails sacrificed in consequence of the breaking of a mast, are made good in general average only for the value they are estimated to have had.

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Things given in composition, sums paid, or ransom bond given to privateers or pirates, in order to ransom the ship and cargo, are considered as general averages. But it is necessary that it should be proved that the composition or ransom took place really for the redemption of the ship and cargo *conjointly*; for if the privateer or pirate had in view the capture of the ship

alone, or the cargo alone, the redemption or repurchase would not be a general average act; but the ship alone, or the merchandise alone, must support the consequences of the composition or redemption effected in its exclusive interest.

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In general, the voluntary stranding of a ship is not considered as a general average act. Exception to this rule is made in particular cases, when it is *clearly* proved that by the stranding there was a *real sacrifice*, of which the ship and cargo have profited; always deducting the damage anteriorly experienced.

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The freight of merchandise jettisoned is reimbursed in general average with the value of the merchandise.

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In the account of the value of the goods sold during the voyage to procure funds, we include equally the entire freight due the captain.

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If some goods are sold in a port of refuge on account of a particular damage, either on account of their being wetted by seawater or on account of *vice propre*, the total freight stipulated for the whole cargo is due the captain, inasmuch as he has conveyed the rest of the cargo to its port of destination. But if the ship is declared unnavigable and sold in the port of refuge, the captain has a right to freight only in proportion to the distance run (*pro rata itineris*.)

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General averages are apportioned conformably to the law upon the value of the cargo, the half of the value of the ship, and the half of the freight, according to their values in the port of destination.

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The value saved is the limit of contribution. The ship-owner

is not compelled to contribute beyond the value of his ship and the amount of freight, nor the proprietors of the cargo beyond the values saved of their merchandise.

If a bottomry bond has been given upon the ship, freight and cargo, they are conjointly held for the reimbursement of the loan, so that if the value of the ship and the amount of the freight are insufficient to pay the averages and expenses put to their account by the adjustment of the averages, the cargo reimburses the difference to the extent of its value. In the contrary case, the ship-owner must supply the insufficiency of the cargo. If the value remaining is insufficient to supply the deficiencies, the holder of the bottomry bond loses the difference.

(Signed,)

ED. VAN PEBORGH,

TH. C. ENGLES.

ANTWERP, *April*, 1863.







